COMMISSION DECISION (EU) 2016/287

of 15 October 2014

on State aid SA.26500 — 2012/C (ex 2011/NN, ex CP 227/2008) implemented by Germany for Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd

(notified under document C(2014) 7369)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

(1) A complaint from Bundesverband der Deutschen Fluggesellschaften e.V. (Federal association of German airlines; hereinafter: 'BDF') of 27 August 2008 informed the Commission of alleged unlawful State aid in favour of Flugplatz Altenburg-Nobitz GmbH and Ryanair Ltd (hereinafter 'Ryanair'). The complaint was registered under State aid number CP 227/2008.

(2) On 9 August 2010, the Commission forwarded the complaint and requested information from Germany. Germany provided the information requested by letter dated 30 September 2010.

(3) On 8 April 2011 the Commission requested information from Air Berlin and Ryanair. Air Berlin provided the information requested on 10 May 2011. Ryanair provided the information requested on 20 June 2011. By letter dated 11 August 2011, the Commission forwarded a translated version of these comments and annexes to Germany. On 28 September 2011, Germany informed the Commission that it would not provide any comments at that stage.

(4) By letter dated 26 January 2012, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) ([2]) (hereinafter 'opening decision') with regard to investment and operating aid in favour of Flugplatz Altenburg-Nobitz GmbH, reduced airport charges for airline companies and marketing agreements with Ryanair.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the alleged aid measures.

(6) On 21 February 2012, the Commission requested additional information from Germany. Germany provided its comments on the opening decision and answers to the Commission's request on 24 February 2012, 30 March 2012 and 2 April 2012.

([1]) OJ C 149, 25.5.2012, p. 5.

([2]) With effect from 1 December 2009, Articles 87, and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU). The two sets of Articles are in substance identical. For the purposes of this Decision references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88 of the EC Treaty when appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this Decision.

([3]) See footnote 1.

(7) On 13 April 2012, the Commission received comments from two interested parties (Ryanair and Airport Marketing Services ([4]) — hereinafter 'AMS').

(8) On 20 April 2012, as some answers to its request for information from 21 February 2012 were missing, the Commission requested further information from Germany. Germany replied on 11 May 2012.

(9) On 25 June 2012, the Commission received further comments from interested parties (Ryanair, Ryanair's subsidiary AMS, and a consultancy firm acting for Ryanair). The Commission transmitted these comments to Germany by letter dated 22 August 2012. Germany requested a translation of the documents and then transmitted its comments on 4 December 2012.

(10) By letter dated 29 November 2012, the Commission requested further information from Germany. Germany responded on 17 January 2013.

(11) On 10 April 2013, Ryanair provided further comments ([5]), which were forwarded to Germany on 3 May 2013.

(12) On 14 November 2013, the Commission requested further information from Germany. Germany answered on 14 January 2014. As the answers from Germany were incomplete, the Commission sent a reminder to Germany on 19 March 2014. Germany answered on 22 April 2014.

(13) On 20 December 2013, Ryanair provided further comments, which were forwarded to Germany on 8 January 2014. On 27 January 2014, Germany commented on Ryanair's comments.

(14) On 17 January 2014 and 31 January 2014, Ryanair provided further comments, which were forwarded to Germany on 7 March 2014. On 7 April 2014, Germany declared not to have any comments regarding Ryanair's contribution.

(15) By a letter dated 25 February 2014, the Commission informed Germany of the adoption of the 2014 Aviation Guidelines ([6]) on 20 February 2014 and of the fact that those guidelines would become applicable to the case at hand from the time of their publication in the *Official Journal of the European Union*. It also gave Germany the opportunity to comment on the guidelines and their application within 20 working days of their publication in the Official Journal.

(16) By letters dated 24 February 2014, the Commission also informed the third parties of the adoption of the 2014 Aviation Guidelines on 20 February 2014 and of the fact that these guidelines would become applicable to the case at hand from the time of their publication in the *Official Journal of the European Union*. It also gave the third parties the opportunity to comment on these guidelines and their application within 20 working days of their publication in the Official Journal.

(17) The 2014 Aviation Guidelines were published in the *Official Journal of the European Union* on 4 April 2014. They replaced the 1994 Aviation Guidelines ([7]) as well as the 2005 Aviation Guidelines ([8]).

(18) On 15 April 2014 a notice was published in the *Official Journal of the European Union* inviting Member States and interested parties to submit comments on the application of the 2014 Aviation Guidelines to this case within one month of their publication date ([9]).

(19) On 29 April 2014, the Commission sent a request for information to Germany, which replied on 7 May 2014.

([4]) Airport MarketingServices Limited is a wholly owned subsidiary of Ryanair. Its main activity is to sell advertising space on the Ryanair website.
([5]) Ryanair provided common comments on several aviation cases, including the case at hand.
([6]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).
([7]) Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the Aviation Sector (OJ C 350, 10.12.1994, p. 5).
([8]) Community guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ C 312, 9.12.2005, p. 1).
([9]) OJ C 113, 15.4.2014, p. 30.

(20) On 6 May 2014, Deutsche Lufthansa AG provided comments on the case in the context of the adoption of the new guidelines. The non-confidential version of these comments was forwarded to Germany on 8 May 2014. Germany provided its comments regarding this submission on 15 May 2014.

(21) On 7 May 2014, the complainant provided comments on the case in the context of the adoption of the new guidelines, the non-confidential version of which was transmitted to Germany on 21 May 2014. Germany answered on 28 May 2014.

(22) On 10 September 2014, the Commission requested further information from Germany and from Ryanair. Germany and Ryanair replied on 16 September 2014.

(23) On 12 September 2014, Ryanair and a consultancy firm acting on its behalf provided comments on this case, the non-confidential version of which was transmitted to Germany on 19 September 2014. Germany provided its comments regarding this submission on 6 October 2014.

2. **BACKGROUND TO THE INVESTIGATION**

2.1. THE FIRST CONVERSION OF THE AIRPORT TO LOW-COST AVIATION SERVICES

(24) Since 1992 the publicly owned company Flugplatz Altenburg-Nobitz GmbH ([10]) has owned and operated the Leipzig-Altenburg airport (formerly named Altenburg-Nobitz airport, hereinafter 'AOC') located in the southern part of the *Land* of Thuringia, Germany. AOC was a former Russian military airfield, abandoned at the beginning of the 1990s. Flugplatz Altenburg-Nobitz GmbH then became responsible for the construction and operation of the airfield AOC. According to the articles of incorporation, the objective of the company is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.

(25) The closest airports to AOC are the following:

(a) Leipzig-Halle airport, located around 85 km and 1h 10 min travelling time by car from AOC;

(b) Dresden airport, located around 113 km and 1h 16 min travelling time by car from AOC;

(c) Erfurt airport, located around 140 km and 1h 37 min travelling time by car from AOC;

(d) Hof-Plauen airport, located around 122 km and 1h 37 min travelling time by car from AOC.

(26) Since it started its activity as a civil airport, AOC has handled fewer than 150 000 passengers per annum. Table 1 provides an overview of passenger numbers at AOC since 2000.

Table 1 ([1])

Number of passengers at AOC from 2000 to 2013 ([2])

Year	Total number of passengers ([3])	Passengers from scheduled flights ([4])
2000	27 876	—
2001	27 345	—
2002	26 811	—
2003	71 006	51 289

([10]) Flugplatz Altenburg-Nobitz GmbH currently has the following shareholders: Landkreis Altenburger Land (60 %), Gemeinde Nobitz (5 %), Thüsac Personennahverkehrsgesellschaft mbH (3 %). All shareholders are either public authorities or fully publicly owned and the company itself holds 32 % of its shares. Source: 2012 financial report of Flugplatz Altenburg-Nobitz GmbH. This is the last report which has been made available to the Commission by Germany.

Year	Total number of passengers ([3])	Passengers from scheduled flights ([4])
2004	93 946	76 742
2005	118 442	101 846
2006	105 213	90 551
2007	147 100	124 411
2008	138 400	126 972
2009	140 800	133 411
2010	119 000	112 985
2011	15 000	9 328
2012	5 400	—
2013	5 000	—

([1]) *Source:* Financial reports from Flugplatz Altenburg-Nobitz GmbH and Germany.
([2]) *Source:* Financial reports from Flugplatz Altenburg-Nobitz GmbH.
([3]) According to Germany, there were no Ryanair flights from 17.12.2004 until 11.1.2005. In 2006, all flight operations were interrupted for two weeks due to construction works.
([4]) The Commission considers that passengers from scheduled flights (*'Linienflugverkehr'*) in the 2003-2011 period are attributable to Ryanair flights.

(27) Eurowings offered nine flights in 2000; Air Berlin operated 62 flights in 2001, 57 flights in 2002 and thereafter ceased to operate from AOC.

(28) On 3 March 2003, the operator of AOC, Flugplatz Altenburg-Nobitz GmbH, and Ryanair concluded an agreement for airport services for a duration of 10 years.

(29) In the peak years (2008-2010), Ryanair offered up to four destinations from AOC. Ryanair first offered daily flights to London and from 2007 flights to Barcelona/Girona. The company also served Edinburgh in 2009 and opened a route to Alicante in 2010. From 1 May 2003, Ryanair was the only company providing scheduled air services to and from AOC.

(30) Ryanair ceased its services at AOC on 31 March 2011. Since then, no other airline has operated scheduled flights from AOC, as also confirmed by the AOC website.

2.2. THE SECOND CONVERSION OF THE AIRPORT TO GENERAL AVIATION

(31) Following the recommendations of the consulting firm KE-Consult GbR ([11]) in 2010 (hereinafter 'the KE-Consult study'), the airport started to develop general aviation activities, focusing on business flights and profiting from the proximity of the growing business region of Chemnitz-Zwickau. The airport stopped the low-cost aviation business and also became a training centre for flying and security staff.

([11]) Studie über den Verkehrslandeplatz Leipzig-Altenburg und das angrenzende Industriegebiet, KE-Consult, Kurte & Esser GbR, September 2010.

(32) The main reasons for this conversion are the following ([12]):

(a) The high dependence of the airport on public contributions, provided mainly by the *Land* of Thuringia and shareholders of Flugplatz Altenburg-Nobitz GmbH: a report drawn up by the company's management in 2011 states that since 1992 approximately EUR 21 million had been invested in the airport, of which EUR 17 million by the *Land* of Thuringia and approximately EUR 4 million by the shareholders of Flugplatz Altenburg-Nobitz GmbH. Nevertheless in both financial years 2009 and 2010 a funding gap ([13]) arose of approximately EUR 270 000. Because of missing shareholders' contributions, the liquidity situation of the airport was jeopardised at the time, which endangered the future of the company.

(b) According to the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH, the low-cost aviation business was to benefit the economic development of the region. Nevertheless the return on investment in the airport was negative: the positive fiscal effect created by AOC for the municipalities and the financing public bodies was lower than the contributions paid to the airport ([14]).

(c) Changes in the shareholders' structure: Stadtwerke Altenburg GmbH (SWA) gave up its participation on 31 December 2010, for which Stadt Altenburg had a preferential buying right.

(d) In 2009 the government of the *Land* of Thuringia changed and the new government proved to be more reluctant to provide further contributions to the airport. The new government in particular rejected decisions taken by the former government to provide the airport with marketing contributions for the 2009-2012 period. As the public shareholders refused to pay further marketing contributions to Ryanair, in the 2010/2011 winter season, only one route to/from London was operated with financial support from regional companies. The shareholders and the board of directors of Flugplatz Altenburg-Nobitz GmbH then refused to grant the EUR 420 000 required by Ryanair as its marketing fee for the 2011 summer flight plan. Ryanair then decided to move its regional hub to Magdeburg/Cochstedt and to end its activities at AOC in March 2011.

(33) A number of conversion options were envisaged by the airport's management. The most viable was the offering of new routes and charter flights for 2012 without any marketing contributions: to that effect, negotiations with Rheinjet for flights to Barcelona were initiated in 2011. Following Ryanair's decision on 26 July 2011 to fly from Leipzig-Halle, the market situation changed for AOC and such new routes were abandoned.

(34) Therefore, in 2011 new activities were decided for the conversion of the airport:

(a) development of business travel transport, which should be more profitable because of lower security requirements;

(b) establishment of companies interested in the aviation business;

(c) establishment of start-up companies,

(d) set-up of photovoltaic facilities (a photovoltaic installation was built in 2012), renting of parking places and facilities, events organisation.

(35) These measures should, according to the management, permit the medium-term own financing of the company through a substantial cost reduction, as up to EUR 520 000 per annum could be saved, which would eventually reduce the funding gap of the airport. The airfield would be maintained and contribute to regional business development.

([12]) Source: Report of the managers of Flugplatz Altenburg-Nobitz GmbH, *Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH*, 9 September 2011.
([13]) 'Deckungslücke'.
([14]) This is demonstrated in the KE-Consult study.

3. THE MEASURES UNDER ASSESSMENT AND THEIR CONTEXT

3.1. OVERVIEW OF THE PUBLIC CONTRIBUTIONS RECEIVED BY FLUGPLATZ ALTENBURG-NOBITZ GMBH

(36) Between 1992 and 2010, approximately EUR 21 million was invested in Flugplatz Altenburg-Nobitz GmbH, of which approximately EUR 17 million by the *Land* of Thuringia and approximately EUR 4 million by its public shareholders ([15]).

(37) Over the 2000-2011 period, Flugplatz Altenburg-Nobitz GmbH received two types of public contributions, from its shareholders and from other public organisations, mainly the *Land* of Thuringia ([16]). According to Germany and the financial reports of Flugplatz Altenburg-Nobitz GmbH, the *Land* of Thuringia mainly financed infrastructure investments, whereas the shareholders contributed to the financing of operating losses. Table 2 lists the total public contributions received by the airport, which were provided with the following main objectives:

(a) financing of investments, mainly infrastructure investments;

(b) financing of operational activity (loss covering);

(c) financing of marketing measures, under various agreements with Ryanair;

(d) financing of public remit activities.

Table 2 ([1])

Overview of total public contributions received by Flugplatz Altenburg-Nobitz GmbH

(in thousands of EUR)

Financial year	Shareholders' contributions	Other public contributions ([2])	Total
2000	256	321	577
2001	256	655	911
2002	256	226	482
2003	960	561	1 521
2004	1 280	395	1 675
2005	914	690	1 604
2006	769	404	1 173
2007	1 057	780	1 837
2008	925	2 032	2 957
2009	957	1 416	2 373

([15]) Source: Report of the managers of Flugplatz Altenburg-Nobitz GmbH, *Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH*, 9 September 2011.

([16]) The articles of incorporation of the airport manager limit the annual capital contribution for each shareholder to five times its share (§ 24, (3)).

(in thousands of EUR)

Financial year	Shareholders' contributions	Other public contributions (2)	Total
2010	1 147	367	1 514
2011	302	0	302
Total	**9 079**	**7 847**	**16 926**

(1) *Source:* Annual financial reports from Flugplatz Altenburg-Nobitz GmbH, at the following pages:
Year 2000: p. 28 & Annex 6, Page 20
Year 2001: p. 28 & Annex 6, Page 23
Year 2002: p. 28 & Annex 6, Page 21
Year 2003: p. 7 & Annex 6, Page 21
Year 2004: Annex 3, Page 5 & Annex 6, Page 19
Year 2005: Annex VI, Sheet 13 & Annex III, Sheet 19
Year 2006: Annex VI, Sheet 12 & Annex III, Sheet 15-16
Year 2007: Annex VI, Sheet 13 & Annex III, Sheet 15-16
Year 2008: Annex VI, Sheet 12 & Annex III, Sheet 15-16
Year 2009: Annex VI, Page 15 & Annex III, Page 14
Year 2010: Annex VI, Page 15 & Annex III, Page 14
Year 2011: Annex VI, Page 13 & Annex III, Page 14.

(2) These contributions have mainly been provided by the *Land* of Thuringia, although other public bodies may have contributed as well.

3.2. FINANCING OF INFRASTRUCTURE INVESTMENTS IN 2000–2011

(38) Germany states that, between 2000 and 2011, Flugplatz Altenburg-Nobitz GmbH undertook infrastructure investments for a total of EUR 6 474 035, for which Table 3 provides a detailed breakdown. Among these investments is the extension of the runway in 2003/2004 for a total amount of EUR 687 882 and the construction of a new terminal in 2009 for EUR 1 003 571 (the terminal was only opened in 2010 ([17])).

Table 3 (1)

Overview of infrastructure investments and their financing at AOC from 2000 to 2011

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources (2)	Total amount of the investment
2000	Weather — acquisition of a central computer, additional equipment, etc.	13 914	9 276	23 190
	Technical acceptance of RT 1000C direction finder	3 590	2 393	5 983
	Water supply (connection, modification) (2)	10 205	6 803	17 008
2001	Reconstruction of the runway and parts of the taxiway	72 652	8 072	80 724
	Acquisition of an air starter	34 495	42 949	77 443

([17]) http://www.lvz.de/Mitteldeutschland/News/Aus-fuer-Linienfluege-ab-Altenburg-Ryanair-zieht-sich-komplett-zurueck *'Aus für Linienflüge ab Altenburg — Ryanair zieht sich komplett zurück'*.

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources [2]	Total amount of the investment
2002	Boundary fence around airfield area (remainder)	26 144	17 429	43 573
	Planning costs — planned extension of RESA 22 and threshold 22	46 183	5 131	51 314
2003	Extension of RESA 22, reconstruction of the runway (1st payment 2003, 2nd payment 2004)	314 550	187 882	687 882
2004	Extension of RESA 22, reconstruction of the runway (2nd payment 2004)	185 450		
2006	Airport beacon, acquisition of software, acquisition of five radio alarm receivers, installation of emergency exit gate, extension of terminal, purchase of 27 biometric transponders, weather station cable extension,	28 787	12 337	41 124
	acquisition of a fire engine (1st instalment 2006)	193 526	82 940	276 466
2007	Acquisition of a fire engine (2nd instalment 2007)	387 052	165 879	552 931
	Acquisition of a jet sweeper	230 040	153 360	383 400
2008	Safety monitoring network	11 430	4 899	16 329
	Uni-mower	5 514	3 676	9 190
	Acquisition of land	56 144	24 062	80 206
	Reconstruction of the runway — safety upgrade	1 816 538	778 516	2 595 054 [3]
2009	Renovation/reconstruction of terminal	702 500	50 672	753 172 [4]
	Marking work on the apron	4 429	1 898	6 327
	Runway repair in front of threshold 04	336 853	0	336 853
2010	Renovation/reconstruction of terminal	0	250 399	250 399 [4]
	Marking work on the apron	0	0	0
	Runway repair in front of threshold 04	0	144 366	144 366

(in EUR)

Year	Infrastructure measure	Public contributions	Own resources (2)	Total amount of the investment
2012	GripTester (flight safety)	28 770	12 330	41 100
	TOTAL	**4 508 766**	**1 965 269**	**6 474 034**

(1) *Source:* Germany.
(2) Own resources from Flugplatz Altenburg-Nobitz GmbH.
(3) This amount is currently being examined and in dispute before the federal state administrative court; therefore it may be subject to change.
(4) Amount subject to change — see footnote 3.

(39) As described in detail in Section 3.4.2, the extension of the runway and the provision of service areas for rental car companies were an obligation of AOC under the Ryanair services agreement. Financial reports of Flugplatz Altenburg-Nobitz GmbH for the relevant years state that the runway was extended ([18]).

(40) At its meeting of 23 June 2000, the board of Flugplatz Altenburg-Nobitz discussed, in the context of the development of the airport, a non-detailed 10-year investment programme amounting to a total investment of approximately EUR 20 million.

3.3. FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN 2000-2011

(41) In the 2000-2011 period, Flugplatz Altenburg-Nobitz GmbH accrued annual losses from the operation of AOC, as described in Table 4.

Table 4 (1)

Overview of annual losses of Flugplatz Altenburg-Nobitz GmbH and their financing

(in thousands of EUR)

Financial year	Operating result without public contributions and public remit costs (2)	Investments (3)	Depreciation	Net financial result (4)	Net result
2000	– 244	204	1 509	– 19	+ 34
2001	– 591	77	1 469	– 24	– 31
2002	– 214	61	1 393	0	+ 51
2003	– 1 161	509	620	+ 2	– 64
2004	– 1 192	428	612	– 1	0
2005	– 671	92	445	– 12	– 272
2006	– 496	2 613	531	– 26	– 253

([18]) In particular, the financial report for 2004 states that the starting and landing distances at the runway were extended and permitted operation of B 737-800 aircraft. According to the agreement between AOC and Ryanair, Ryanair used B 737-300 or other B 737 variant aircraft at AOC.

(in thousands of EUR)

Financial year	Operating result without public contributions and public remit costs ([2])	Investments ([3])	Depreciation	Net financial result ([4])	Net result
2007	– 719	1 071	533	– 1	– 301
2008	– 511	664	645	– 2	– 460
2009	– 906	2 354	821	+ 7	– 562
2010	– 1 150	1 296	965	– 2	– 567
2011	– 424	8	907	– 13	– 437

([1]) *Source:* Germany and annual financial reports from Flugplatz Altenburg-Nobitz GmbH.
([2]) Operating result is calculated as revenues from operational activities — from which total public contributions as stated in Table 2 have been deducted — less direct operating expenses (personnel + materials + other expenses), according to the data provided by the annual financial reports from Flugplatz Altenburg-Nobitz GmbH.
([3]) The investment amounts mentioned in Table 4 come from the annual financial reports from Flugplatz Altenburg-Nobitz GmbH and differ from the investment amounts provided by Germany in Table 3.
([4]) The net financial result comes from the difference between financial revenues and financial expenses. According to Germany, Flugplatz Altenburg-Nobitz GmbH had no bank loan during that period; financial expenses were mostly linked to interest to be paid on contributions received in the past and not yet used.

(42) Germany provided the data reported in Table 5 on shareholders' annual contributions dedicated to the coverage of operating losses of Flugplatz Altenburg-Nobitz GmbH ([19]); in total, these capital contributions amount to EUR 8,9 million.

Table 5

Shareholders' contributions for operating purposes

(in EUR)

2000	200 000-300 000 […]*
2001	200 000-300 000 […]*
2002	200 000-300 000 […]*
2003	300 000-400 000 […]*
2004	475 000-575 000 […]*
2005	700 000-800 000 […]*
2006	925 000-1 025 000 […]*
2007	1 250 000-1 350 000 […]*

([19]) The data reported in Table 5, provided by Germany, differ from the data reported in Table 2, provided by the annual financial reports from Flugplatz Altenburg-Nobitz GmbH.

(in EUR)

2008	1 125 000-1 225 000 […]*
2009	1 125 000-1 225 000 […]*
2010	1 325 000-1 425 000 […]*
2011	425 000-525 000 […]*
Total	**8 897 000**

[…]* Covered by the obligation of professional secrecy.

(43) Since the beginning of the period in question, financial reports from Flugplatz Altenburg-Nobitz GmbH indicate that the financial situation of the airport is highly dependent on shareholder contributions. The 2002 financial report states that the existence of the company would be in danger without financial contributions from shareholders and that further shareholder contributions were needed. Several other financial reports (years 2003 and 2004) also state that the company can only survive thanks to the shareholder capital contributions ([20]). The annual outlook in the financial report for the year 2003 already foresees that shareholder capital contributions will be needed in the next financial period. In 2006, an imminent insolvency could only be avoided through shareholder contributions, according to the financial statement of 2006.

(44) Germany states that the public remit costs relate to personnel costs for air traffic control, fence control, administration, check-in, training and pilots and were financed both by own capital of Flugplatz Altenburg-Nobitz GmbH and the *Land* of Thuringia, as set out in Tables 6 and 7.

Table 6

Financing of public remit costs at Flugplatz Altenburg-Nobitz GmbH ([1])

(in EUR)

Year	Total public remit costs	Equity	Financing by the *Land* of Thuringia
2000	276 420	106 031	170 389
2001	278 773	127 043	151 730
2002	292 270	134 801	157 469
2003	412 325	247 279	165 046
2004	461 067	293 713	167 354
2005	685 406	529 734	155 672
2006	683 415	527 017	156 398

([20]) Flugplatz Altenburg-Nobitz GmbH, Jahresabschlusses zum 31. Dezember 2002, Lagebericht 2002, p. 4.

(in EUR)

Year	Total public remit costs	Equity	Financing by the *Land* of Thuringia
2007	732 355	597 858	134 497
2008	700 772	599 954	100 818
2009	718 416	347 598	370 818
2010	657 982	313 933	344 049
2011	598 056	261 654	336 402
TOTAL	**6 497 257**	**4 086 615**	**2 410 642**

([1]) *Source:* Germany. Germany mentions that public remit costs exceed the amounts mentioned in Table 6, but does not provide any further information on the exact amount.

Table 7 ([1])

Distribution of the *Land* of Thuringia's financing according to the type of public remit cost

(in EUR)

Year	Air traffic control	Airport control services	Total financing by the *Land* of Thuringia
2000	170 389	0	170 389
2001	151 730	0	151 730
2002	157 469	0	157 469
2003	165 046	0	165 046
2004	167 354	0	167 354
2005	155 672	0	155 672
2006	156 398	0	156 398
2007	134 497	0	134 497
2008	100 818	0	100 818
2009	100 818	270 000	370 818
2010	94 049	250 000	344 049
2011	86 402	250 000	336 402
TOTAL	**1 640 642**	**770 000**	**2 410 642**

([1]) *Source:* Germany.

3.4. AIRPORT CHARGES AND PAYMENTS TO RYANAIR UNDER THE AIRPORT SERVICES AND MARKETING AGREEMENTS

3.4.1. **The schedule of airport charges at AOC**

(45) Table 8 summarises the key terms of the standard schedules of airport charges applied at AOC during the 2002-2010 period ([21]).

Table 8

Schedule of airport charges applicable at AOC between 2002 and 2010 ([1])

Prices without VAT	Landing charges for aircraft with more than 6 001 kg/ per 1 000 kg	Passenger charges/per passenger
Schedule of airport charges from 1 January 2002	EUR 7,78	EUR 2,67
Schedule of airport charges from 18 September 2006	EUR 7,45	EUR 3,00

([1]) *Source:* Germany.

(46) In January 2011, a new schedule of airport charges was established, with the key terms described at Tables 9 and 10.

Table 9

Schedule of airport charges applicable to aircraft since 2011 ([1])

Schedule of airport charges from January 2011 (Prices without VAT)	Up to 30 min turnaround time	Over 30 min turnaround time
For passenger flights with planned rotations ([2])	EUR 0	EUR 7,45
For passenger flights without planned rotations and freight flights	EUR 7,45	

([1]) *Source:* Germany.
([2]) The German word used for the planned rotations is '*Linienflugbetrieb*'.

Table 10

Schedule of airport charges applicable to passengers since 2011 ([1])

Schedule of airport charges from January 2011 (Prices without VAT)	Number of passengers less than 50 000	Number of passengers between 50 000 and 100 000
Charge per passenger	EUR 6,00	EUR 4,20

([1]) *Source:* Germany.

([21]) The charges in Tables 8 and 9 apply to aircraft which are included in a specific list called '*Bonusliste*', which lists different aircraft types according to their technical characteristics in terms of pollutant emissions: aircraft with the best environmental performance are included in the list and new aircraft are automatically included in the list.

3.4.2. **The Ryanair airport services agreement of 3 March 2003**

(47) On 3 March 2003, Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Ryanair ('Ryanair Limited') signed an agreement for airport services for a duration of 10 years. The agreement entered into force with the daily scheduled service to London-Stansted, which was to start on 1 May 2003.

(48) According to this agreement, Ryanair pays AOC:

(a) a fee for the operation of passenger air services according to AOC's scale of charges in effect on the day of the service;

(b) an amount equal to passenger security taxes and state fees ('DE tax') at the rate in force at the time of operation of the flight. The original charge amounts to 'Four euro and fifty one cents (EUR 4,08)' ([22]). The agreement also specifies the intention of both parties to try to reduce the DE tax if the passenger volume through the airport grows. Ryanair is to collect the original charge as a minimum charge in any event.

(49) Germany states that Ryanair paid the fees for the operation of the services according to the AOC standard fee regulation in force at the time, corresponding to a fixed landing fee of […]* per aircraft and a passenger fee of […]* per passenger (without VAT) ([23]) (fees paid in June 2009).

(50) This airport services agreement of 3 March 2003 stipulates that AOC is obliged in return to:

(a) provide a runway meeting specific technical specifications by 31 December 2003, to be completed and extended by 31 May 2004;

(b) provide terminal and infrastructure services ([…]*) and services in terms of sales, marketing and public relations (services set out in Annex A to the service agreement);

(c) provide handling and related services (services set out in Annex B to the service agreement);

(d) ensure the operation of a bus service at standard local fares between AOC and Leipzig-Bahnhof and between AOC and Dresden-Bahnhof;

(e) operate a reservations facility (service set out in the Appendix to Annex B to the service agreement).

(51) In addition to the obligation of Flugplatz Altenburg-Nobitz GmbH to provide the runway, Annex A to the agreement sets out several other services to be provided by AOC:

(a) terminal and infrastructure services: […]* and other 'reasonable requirements of Ryanair on an ad hoc basis to ensure that Ryanair can maintain a 25-minute turnaround';

(b) services in terms of sales, marketing and public relations: […]*.

(52) The fees referred to at recital 48 paid by Ryanair include several services as set out in Annex B 'Handling and related services to be provided by ground handling agents' to the airport services agreement of 3 March 2003, such as ([24]): baggage loading and unloading (no cargo); toilet and water service upon request […]*; […]* and supply and application of de-icing materials when required by Ryanair with fluid charged at […]* per litre; passenger check-in, boarding and disembarkation and checking of travel documents.

([22]) The Commission notes the difference between the number expressed in words and in figures.
([23]) Germany provided the invoice sent by Flugplatz Altenburg-Nobitz GmbH to Ryanair regarding June 2009. Despite further requests from the Commission, Germany has not provided any further information regarding the exact fees per passenger and per aircraft paid by Ryanair throughout the period 2003-2011.
([24]) This is only an enumeration of certain measures. The full list of services is contained in Annex B.

(53) According to the Appendix to Annex B, 'Reservations Facility', to the airport services agreement of 3 March 2003, the handling agent has to establish and operate a passenger service desk, keep reservation staff adequately trained, and pay for computer hardware and telephone, fax, IT and telecommunication devices in air transport (SITA) and all equipment maintenance and replacement costs incurred by the handling agent in the running of the passenger desk. However, […]*.

3.4.3. **The marketing services agreements**

(54) Flugplatz Altenburg-Nobitz GmbH signed in total three marketing services agreements, the first one with Ryanair and the two following ones with Airport Marketing Services Limited (AMS), and a side letter supplemental to the last agreement of 25 January 2010.

Table 11

Marketing agreements between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS

Agreement	Duration	Purpose	Fees to be paid by AOC to Ryanair
Agreement of 7.4.2003 between AOC and Ryanair	15.4.2003-30.4.2013	English language advertisements for the internet and sales promotion and public relations to promote the marketing of air-based tourism in the Altenburg area	— A success fee based on the number of departing passengers, to be deducted from the charges for airport services paid by Ryanair — A success fee based on a certain percentage of any increase in fees at the airport
Agreement of 28.8.2008 between AOC and AMS	28.8.2008-27.8.2010	Marketing services involving the use of ryanair.com website as primary tool: 150-word paragraph/s within the 'Top five things to do' section of the AOC destination page	[…]* for 2008 […]* for 2009 (1) (both amounts excluding VAT)
Agreement of 25.1.2010 between AOC and AMS	25.1.2010-end of one year after the date of launch of the first service	Marketing package to be provided for one year	[…]* per annum (1) (excluding VAT)
Side letter of 21.9.2010 between AOC and AMS	21.9.2010-31.3.2011	Supplementary agreement to the original agreement of 25.1.2010	[…]* for the winter period 2010

(1) The agreement refers to the current AMS rate.

3.4.3.1. *The marketing agreement of 7 April 2003*

(55) Under the first marketing agreement concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Ryanair on 7 April 2003, valid as from 15 April 2003 for 10 years, Ryanair is to undertake marketing efforts to promote the Altenburg area. The agreement gives Ryanair the final say as regards all decisions on promotion and advertising, except in relation to AOC's website.

(56) In consideration of the tasks undertaken by Ryanair, Flugplatz Altenburg-Nobitz GmbH is to pay the following fees:

(a) a 'success fee' per departing passenger, to result in a net charge to be paid by Ryanair per passenger in respect of landing, local air traffic control, lighting, parking (not including overnight parking), ramp and passenger handling, infrastructure and passenger service charge for the passenger air services. AOC is to calculate the net charge per passenger according to the passenger load sheets and to present the calculation to Ryanair at the end of each week. Ryanair is to calculate the success fee and present the calculation to AOC in a 30-day period after the end of each month; the calculation is to be based upon the services of the preceding calendar month. Ryanair may deduct its success fee from AOC's monthly bills of the landing fees.

Table 12

Net charge per passenger to be paid by Ryanair to AOC

(in EUR)

Number of rotations of the services	Net charge per departing passenger including all charges (except security) Year 1-5	Net charge per departing passenger including all charges (except security) Year 6-10
[…]*	[…]*	[…]*
[…]*	[…]*	[…]*
[…]*	[…]*	[…]*

(b) a 'success fee' based on a certain percentage of any increase in fees at the airport, consisting in:

— 100 % of any increase in the security tax levied by the government up to a maximum of 10 % over the existing published rate in a five-year period, and

— 100 % of any increase in the existing published fees or additional fees, charges or taxes introduced in the published charges of the airport up to a maximum of 10 % of the existing total published fee paid by Ryanair, in a five-year period.

3.4.3.2. *The marketing agreement of 28 August 2008*

(57) A second marketing services agreement was concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services on 28 August 2008. According to the agreement, AOC intends to actively promote the city's and the region's facilities and increase the share of inbound passengers on Ryanair's services and hence maximise the airport's non-aeronautical revenues. The agreement is linked to Ryanair's commitment to operate a route from AOC to London Stansted in the summer (daily) and in the winter (four times a week) and one to Girona, three times a week only in the summer.

(58) The agreement has an initial duration of two years. AOC pays EUR […]* for year 1 and EUR […]* for year 2. In return, AOC receives […]*. The agreement does not include any further indication as regards the duration, placement or other details of the link.

(59) Flugplatz Altenburg-Nobitz GmbH has the right to choose its preferred time slots for the marketing measures. However, due to limited availability, these slots cannot be guaranteed. Flugplatz Altenburg-Nobitz GmbH also has the right to choose websites that can be connected via a link on to the Ryanair website. However, this right is limited by the fact that websites cannot include flights, car rental or accommodation and/or any other services that are also offered on the Ryanair website. Moreover, Ryanair has the final say and can refuse to allow publication of the website. Flugplatz Altenburg-Nobitz GmbH also has to check that the services have been provided in line with the agreement.

3.4.3.3. *The marketing agreement of 25 January 2010*

(60) A third marketing services agreement was concluded between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services on 25 January 2010. According to the agreement, AMS is to offer tourism-related marketing services on the Ryanair website, so that AOC can advertise its business and tourist attractions. The agreement is subject to Ryanair's commitment to operate summer routes — commencing in summer 2010 and for the IATA summer season only ([25]) — from AOC to London Stansted (seven times a week), Girona (three times a week) and Alicante (twice a week).

(61) The agreement has an initial duration of one year. AOC pays EUR […]* for one year for the following package of marketing services: […]*. The rights and duties of AOC as regards time slots, nature of websites and the final say of Ryanair are identical to those described in the previous agreement.

3.4.3.4. *The side letter of 21 September 2010*

(62) The side letter of 21 September 2010 was signed between Flugplatz Altenburg-Nobitz GmbH (named 'AOC' in the agreement) and Airport Marketing Services. The agreement is supplemental to the original marketing services agreement of 25 January 2010, as AOC wishes to purchase further advertising services ([26]) for the amount of EUR […]* for the winter 2010 period only. The side letter expires on 31 March 2011.

(63) Advertising services to be provided by AMS according to the side letter consist of 'the presence of a link to a website designated by Flugplatz Altenburg-Nobitz GmbH displayed on www.ryanair.com UK home page for 12 days for the duration of this side letter'.

(64) According to Germany, payments under this side letter were made by private companies, after they agreed with maintaining Ryanair operations at AOC.

4. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE AND THE INITIAL ASSESSMENT BY THE COMMISSION

(65) In its opening decision, the Commission raised the following questions regarding the measures under assessment:

(a) Measure 1: Financing of infrastructure investments in 2000-2011. Whether payments made for the airport infrastructure during the period 2000-2011 amounting to EUR 6 474 034 in total — including the extension of the runway as stipulated in the agreement of 3 March 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair — constitute State aid and, if this is the case, whether this State aid is compatible with the internal market.

(b) Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011. Whether public shareholders acted in line with the market economy investor principle when they granted annual operating aid during the period 2000-2011 for a total amount of EUR 9,079 million to Flugplatz Altenburg-Nobitz GmbH and, if not, whether this State aid is compatible with the internal market.

(c) Measure 3: Airport charges and payments to Ryanair under the airport services and marketing agreements. Whether Flugplatz Altenburg-Nobitz GmbH, in accepting a reduction in the revenues for airport services through the mechanism of the marketing fees to be paid to Ryanair/AMS for the period from 1 May 2003 until 31 March 2011, acted as a market economy investor and, if these reductions constitute State aid, whether this aid is compatible with the internal market. In receiving reduced airport charges, the public operator of the airport, Flugplatz Altenburg-Nobitz GmbH, forwent revenues. The marketing payments to Ryanair and AMS were made by the public operator of the airport, except for the last marketing agreement, the side letter of 21 September 2010, for which payments were made by private companies. In this respect, the Commission will exclude from the scope of its analysis this last marketing agreement signed with AMS on 21 September 2010, as its financing was provided by private regional companies which had agreed to the maintaining of Ryanair's activity at the airport.

([25]) The IATA summer season started on 28 March 2010 and ended on 30 October 2010.
([26]) Paragraph 3.2 of the agreement of 25 January 2010 leaves open the possibility for AMS to provide additional marketing services upon agreement between the parties.

5. COMMENTS FROM GERMANY

5.1. FINANCING OF INFRASTRUCTURE INVESTMENTS IN 2000–2011 (MEASURE 1)

(66) Germany explains that public contributions to infrastructure investments at the airport directly derived from the logic on which the conversion of the airport was based. Its conversion from a military airfield into a civil airport was justified by the economic development of the regions of eastern Thuringia and western Saxony ([27]). Paragraph 2(1) of the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH indeed specifies that the objective of the company is to improve the business-related infrastructure in order to strengthen the eastern Thuringia and western Saxony regions from an economic perspective. A report drawn up by the company's managers ([28]) values annual revenues deriving from foreign passengers transiting through the airport at EUR 10,7 million for the whole region of Central Germany.

(67) According to Germany, the provision of infrastructure is part of the State's powers within the framework of its competence for spatial planning, regional development and regional transport policy. These kinds of infrastructure investments are therefore based not only on exclusively economic reasons for the benefit of an undertaking, but are also part of the State's role in serving the general interest.

(68) Germany adds that the *Land* only has the right ([29]) to finance specific activities which are in its direct interest and which would not be feasible without public subsidies. Overcompensation is avoided through an *ex post* control of the correct use of the funds provided ([30]).

(69) According to Germany, it is well known that especially regional airports can often not cover their costs and investments through airport charges and that therefore public co-financing can be necessary. In particular, Germany argues that the infrastructure investments had to be financed by public authorities in order to meet the necessary legal requirements in terms of security and safety. AOC, as a regional airport, is not in a position to generate sufficient income through airport charges to finance all infrastructure investments. The company could also not have complied with its legal obligations, including security requirements for the aviation business, without public subsidies.

(70) Germany points out that the reconstruction works on the terminal in 2009 were carried out because of safety requirements, in order to comply with the requirement for separate handling of Schengen and non-Schengen passengers. According to Germany, alternatives to this reconstruction were considered, but, in view of the higher number of passengers and the high costs required for these alternative options, the long term solution of reconstructing the terminal was pursued.

(71) Germany states that the total amount of EUR 6 474 034 invested in infrastructure in the period 2000-2011 ([31]) exclusively related to non-economic activities. According to Germany, these infrastructure investments do not constitute State aid and are not subject to State aid rules under Article 107 TFEU. Germany further explains that this amount of investments into non-economic activities can be divided into security investments and investments in public and aviation safety. Germany points out that security and policing activities, fire protection measures, public and operational safety, meteorological services and flight security fall within the public policy remit. Germany points out further that a substantial amount of the funds received served to secure the safety of the infrastructure and its renovation, not to construct new infrastructure.

(72) Germany further states that, out of the total amount of investments of EUR 6 474 034, 30 % was financed from Flugplatz Altenburg-Nobitz GmbH's equity and the remainder through the *Land* of Thuringia. Germany points out that the financing of these infrastructure investments was provided as non-refundable grants and not through loans. The conditions for these grants result from the requirements listed in the *Thüringer Landeshaushaltsordnung* ([32]).

([27]) Germany states that more than EUR 16,5 million was invested in the development of the industrial area, which currently employs some 250 people on approximately 58 ha.

([28]) Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH, 9 September 2011.

([29]) Paragraph 23 of the Thüringer Landeshaushaltsordnung.

([30]) In this regard, Germany provides the example of a subsidy decided and paid in 2009, which was subject to an *ex post* control and partial reimbursement in 2012.

([31]) See Table 3.

([32]) The *Thüringer Landeshaushaltsordnung* is the budget code of the *Land* of Thuringia. Section 23 of the budget code provides for requirements that must be met in order to receive financial contributions from the budget of the *Land*. The *Land* of Thuringia must have a substantial interest in the implementation of the project for which the contributions are provided and which could not be or could not be adequately implemented without them. Conditions for receiving contributions are furthermore elaborated in the *Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung (ANBest-P)*, which are the general terms and conditions for contributions to development projects.

(73) Germany also states that conversion projects have also been financed in other *Länder* wholly through public funding, in line with Article 107(3)(c) TFEU, in order to promote regional economic development. Germany also refers to a previous Commission decision ([33]) stating that the construction or extension of regional airports in structurally weak areas is compatible with the Treaty on European Union.

Dedicated infrastructure for Ryanair

(74) Regarding the investments required by Ryanair in its service agreement (a landing runway meeting specific technical characteristics, to be provided by 31 December 2003 and to be completed and extended by 31 May 2004 ([34])), Germany states that this specific prolongation has not been carried out in full and it was not considered a contractual obligation but a prerequisite for any airline to be able to land at AOC. Germany states that the length of the runway at AOC has been adapted over the years from 2 185 m (7 July 2003) to subsequently 2 235 m (9 September 2004) to finally 2 435 m (9 December 2008). However, the runway was open to all users. According to Germany, the fact that this runway was only used by Ryanair does not change the assessment.

(75) Germany also rejects the argument advanced by the complainant that the runway was extended especially for Ryanair's Boeing 737-800 (107 planes in 2007), since this aeroplane is actually also widely used by other airlines, for example by Deutsche Lufthansa (132 planes in 2007). Furthermore, Germany points out that the suggestion made by the complainant that until 2007 public funds of EUR 28 million have been invested for the modernisation of the airport is erroneous. The complainant would be referring to information in which only estimations about the possible costs were being made. Real investments amounted to EUR 16,7 million according to Germany.

(76) In addition, Germany argues that the obligations required by Ryanair in the service agreement, Annexes A, B and in the Appendix to Annex B are general obligations that an airport has to fulfil in order to be able to provide the service requested by airline companies: Germany states that the services referred to at recitals 50-53 are normal obligations of any airport and that its infrastructure is open to all users. Germany adds that some services mentioned in Annex A to the service agreement, such as press conferences, journalists' trips and travel agency evenings, have not been provided.

State aid assessment

(77) Between 1993 and 1997, the *Land* of Thuringia invested EUR 12,25 million in the airport's infrastructure. For the years 1998 to 2011, the *Land* of Thuringia approved fund contributions of EUR 4,5 million to Flugplatz Altenburg-Nobitz GmbH. These funds were provided on the basis of published aid schemes of the *Land* of Thuringia, the notification of which was not deemed necessary. According to Germany, aid under these schemes is open to all airport operators in Thuringia. Under these aid schemes, public funds are to be granted for infrastructure investments which are necessary for air traffic, are open for use to all potential users and serve the general public interest. These funds are also limited to appropriate and necessary amounts and Germany points out that, since 1997, airports have also been sharing part of the infrastructure costs. Therefore, Germany states that no distortion of competition could arise from these schemes.

(78) As regards infrastructure investments made between 12 December 2000 — the date of the Court judgment in the *Aéroports de Paris* case — and 9 December 2005 — the date on which the 2005 Aviation Guidelines became applicable — Germany considers that the criteria applicable are unclear: with the application of the 1994 Aviation Guidelines, the infrastructure cannot be considered State aid from the outset. Germany argues in this regard that the 1994 guidelines were applicable until the 2005 guidelines came into force and the *Aéroports de Paris* judgment does not change this. Therefore, since the 1994 guidelines are binding on the Commission under the principle of legitimate expectations, these should be applied to the infrastructure investments up until 2005. Therefore the measure cannot be classed as State aid: although infrastructure payments were made through public funding, this funding relates to public policy remit activities and does not pertain to an economic activity.

([33]) SA 16588 (N 644i/2002) — Deutschland — Errichtung oder Ausbau von Regionalflughäfen.
([34]) See recital 50(a).

(79) As regards infrastructure investments made after 9 December 2005, Germany considers, firstly, that these do not constitute aid for the reasons mentioned in recitals 66 to 73. Should the Commission nevertheless come to the conclusion that these investments do constitute aid, then Germany claims that it is compatible with the internal market under Article 107(3)(c) TFEU as it fulfils all the requirements of point 61 of the 2005 Aviation Guidelines:

(a) As to the first requirement, Germany claims that the infrastructure investments aim at a clear objective of common interest, which is to provide transport infrastructure and regional development in a structurally weak region. In this regard, AOC was the first military airport to be converted for civil use after the reunification of Germany. AOC is also of importance for companies situated in the nearby industrial area. Incoming tourism should furthermore help in improving regional tourism and creating jobs.

(b) As to the second requirement, Germany claims that the infrastructure investment is necessary and proportional to the objective set. Germany reiterates that all investments were made to renovate and update the airport. Since the operator, Flugplatz Altenburg-Nobitz GmbH, did not have sufficient funds, public funding was needed.

(c) As to the third requirement, Germany is of the opinion that the medium-term prospects for use of the existing infrastructure were satisfactory, at least until 2009. According to three studies carried out in 2007 ([35]), the operator of the airport was to improve its annual results and achieve an almost balanced operating income by the year 2015, together with the strengthening of the nearby industrial area. One study ([36]) refers especially to the profitability of low-cost carrier traffic and sets out a possible scenario that AOC could reach 500 000 passengers by 2015, which is even described as a conservative estimate. This proves, according to Germany, that Flugplatz Altenburg-Nobitz GmbH and its shareholders always acted as private investors.

(d) As to the fourth requirement, Germany explains that all potential users of the infrastructure have access to it in an equitable and non-discriminatory manner.

(e) As to the fifth requirement, Germany states that the development of trade is not affected to an extent that is contrary to the common interest. AOC is an airport with fewer than 150 000 annual passengers, hence a category D airport, and there is no distortion of competition vis-à-vis other airports.

(80) Lastly, Germany considers that the measure does not threaten to distort, or distort competition in the internal market since the infrastructure is open to all users on a non-discriminatory basis. In addition, as a category D airport according to the 2005 Aviation Guidelines, the airport annually counts fewer than 150 000 passengers and as such does not compete with other airports. Competition between AOC and the other airports at Dresden, Erfurt-Weimar and Hof is negligible. Moreover, as the share of AOC only accounts for 0,1 % of the entire traffic of all German airports listed in the ADV ([37]), Germany states that this airport is not in competition with any European airports, which means that there is no effect on competition in the internal market and on trade between Member States. In this regard, Germany points out that AOC handles only 2 % of the workload units handled at, for example, Leipzig/Halle airport.

Conclusions from the 2010 KE-Consult study on the future development prospects of the airport and its region

(81) When it became apparent that the scenario predicted in the 2007 studies would not materialise, the airport asked the consulting firm KE-Consult to draw up a study on AOC and the adjoining industrial area; the study was submitted in 2010. It concludes that further developments of the airport as a low-cost airport would not be commercially viable and recommends focusing on general aviation. Therefore, in September 2011, the management board of Flugplatz Altenburg-Nobitz GmbH submitted a new development plan for the airport,

([35]) 'Plausibilitätsprüfung über die Wirtschaftlichkeit der Flugplatz Altenburg-Nobitz GmbH unter Berücksichtigung des Wirtschafts- und Finanzplanes für die Jahre 2007 bis 2010' (31 August 2007) and 'Kapitalflussrechnungen FAN für die Geschäftsjahre 2007 bis 2015' (16 November 2007) by BDO — Deutsche Warentreuhand Aktiengesellschaft Wirtschaftsprüfungsgesellschaft; 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klophaus, September 2007; 'Planentwurf für den Zeitraum 2011–2015: Wirtschafts-, Vermögens-, Finanz- und Investitionsplan' by Flugplatz Altenburg-Nobitz GmbH, 15 November 2007.

([36]) 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klophaus, September 2007.

([37]) *Arbeitsgemeinschaft Deutscher Verkehrsflughäfen* — Professional association of German airports.

which was agreed by the supervisory board and the shareholder's meeting. AOC will not be open to low-cost airlines or to any commercial aviation business, but to general aviation and should become profitable through this new business development by 2015.

(82) The KE-Consult study recognises that shareholders of Flugplatz Altenburg-Nobitz GmbH continuously subsidised the company. Given this constantly increasing need for subsidies, the limit of economic efficiency had been reached for shareholders.

(83) The KE-Consult study was conducted to explore possible development prospects for AOC on the basis of the airport's regional, political, economic and fiscal impact. In this respect, various scenarios were elaborated on the discontinuation, the unchanged continuation or the expansion of low-cost carrier aviation as well as the development of the industrial park around the airport.

(84) Only the 'general aviation' scenario, which implies the discontinuation of low-cost carrier aviation at AOC, can meet the requirements for microeconomic and fiscal equilibrium. This is the only scenario where the airport only needs the shareholders' obligatory annual additional contribution of EUR 227 000 per shareholder but no other payments. This scenario shows a macroeconomic benefit. Up to 2015, this scenario would cost EUR 0,83 million for the shareholders and can be covered by the mandatory contributions of EUR 227 000 per year. No further subsidisation by shareholders would be necessary after 2015, as long as depreciation continues to fall. The regional economic efficiency is much higher than in all other scenarios. The 2015 fiscal balance for Thuringia and its municipalities is also positive.

(85) All other scenarios, in which low-cost carrier aviation is continued or expanded, are economically not sustainable through the shareholders' mandatory contributions. The fiscal effect for Thuringia would amount to between EUR 115 000 and EUR 375 000 per year, depending on the scenario. In all low-cost carrier scenarios, the positive fiscal effect resulting from AOC and the municipalities would be lower than the contributions needed by the airport and therefore the fiscal income-costs balance is negative.

(86) The additional macroeconomic impact of low-cost carrier aviation will only be achievable if investments of EUR 6,7 to 10 million are provided, in addition to the shareholders' mandatory contributions. The regional economic efficiency in the low-cost carrier scenarios is lower than in the general aviation scenario. Compared with the general aviation scenario, the level of necessary contributions is 11 to 15 times higher in the low-cost carrier scenarios, while the added value effects are only two to three times higher. Whereas the fiscal income-costs balance is positive in the general aviation scenario, it is negative in all low-cost carrier scenarios.

(87) Furthermore, several framework conditions were taken into account:

(a) Uncertainty due to monopoly users and external influences: aviation development at AOC is dependent to a large extent, at least in relation to low-cost carrier traffic, on the contracts with relevant airlines and on external influences such as the British tourist tax or the German air traffic tax, which can have an enormous negative impact on the volume of low-cost carrier traffic.

(b) Non-approval of further continual subsidies: fair and subsidy-free competition would be jeopardised and this would not be in accordance with the air traffic plan for Germany and the agreements of the political coalition at *Land* level.

(c) Lack of sustainability: in the low-cost carrier scenarios, no improvement of the fiscal and microeconomic balances can be seen. The low-cost carrier business model would only incur an increasing need for subsidies until 2015 and beyond.

(88) The KE study therefore concludes that continuation or expansion of low-cost carrier traffic at AOC cannot be recommended to shareholders and to the *Land* of Thuringia.

5.2. FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN 2000-2011 (MEASURE 2)

(89) The financial reports of Flugplatz Altenburg-Nobitz state that the airport could not ensure operational activity without public contributions to cover losses. The system set up by the company consisted in annual business plans established every year for the year to come and approved by the shareholders' meeting and then updated during the year in question with the current data registered by the airport ([38]). This system thus allowed the airport to update the public financial contribution needed to cover the losses.

(90) Germany states that the losses registered since the beginning of the 2000s, which resulted in shareholders' contributions, were not exclusively caused by infrastructure investments: depreciation does not fully explain the losses and financial costs did not account for them either, as the airport had no credit financing. The annual losses of Flugplatz Altenburg-Nobitz GmbH were only partially linked to depreciation costs and Germany also does not directly link these to Ryanair.

(91) Concerning the claims made by the complainant as cited in the opening decision, Germany rejects these claims in their entirety. According to Germany, the complainant does not take into account the single-till approach ([39]) at AOC. Germany states that in 2009 non-aviation income was at the same level as aviation income. In this regard, Germany rejects the claim that the growing number of passengers implied increasing losses for Flugplatz Altenburg-Nobitz GmbH due to secret payments made to Ryanair. Germany states that the losses incurred were caused by many different factors, which were unrelated to Ryanair.

(92) Germany in particular rejects the claim that the Ryanair route from AOC to London-Stansted had been in direct competition with the Air Berlin route from Leipzig-Halle to London-Stansted, and that this was the reason why Air Berlin discontinued the Leipzig-Halle to London-Stansted route. Germany emphasises that the discontinuation of Air Berlin operating the route to London-Stansted was due to the fact that Leipzig-Halle no longer subsidised Air Berlin and that a ban on night flights was introduced.

(93) Germany considers that annual shareholders' payments to Flugplatz Altenburg-Nobitz GmbH do not constitute State aid, since the requirements of the market economy investor principle are met, according to which all economic advantages afforded to Landkreis Altenburger Land, the main shareholder, have to be taken into account ([40]). Germany refers to the 2007 study conducted by Prof. Dr Klophaus ([41]) (hereinafter 'The Klophaus study'), which mentions 'lost subsidies' of Landkreis Altenburger Land: shareholders' payments had a positive economic impact on Landkreis Altenburger Land due to additional tax payments. Total 2006 tax revenues gained through the operation of AOC amount to EUR 7,9 million, of which EUR 1 million is mainly to the benefit of Landkreis Altenburger Land. This sum was to triple by 2015 if the annual number of passengers increased to 500 000. Since the return through tax payments is higher than annual shareholders' payments, Germany concludes that Landkreis Altenburger Land acted as a private investor.

(94) Regarding the argument as to a possible closure of the airport instead of further shareholders' contributions, Germany confirms that Landkreis Altenburger Land acted as a private investor: if the airport had been closed, the airport operator would have been liable to reimburse around EUR 7 million to the *Land* of Thuringia as this would have been a premature termination of infrastructure usage. In avoiding this reimbursement, shareholders also acted as private investors.

The Klophaus study

(95) The Klophaus study from 2007 draws the following conclusions. It states that the direct, indirect, induced and catalyst effects of AOC for the economy and attractiveness of the region, especially in terms of jobs, are positive and significant. Future prospects for AOC are also positive, according to the study, as AOC has the potential to become the Ryanair base for central Germany, which is what Flugplatz Altenburg-Nobitz GmbH is striving for. Therefore, with so many Ryanair planes stationed at AOC, passenger numbers could potentially grow to 1 million per year in the medium term. This would allow AOC to become a regional airport offering the chance

([38]) Germany provided the Commission with business plans established for the years 2000-2005 ('*Wirtschaftsplan*') and their corresponding updates established the following year ('*Nachtrag zum Wirtschaftsplan*').
([39]) The single-till approach means that all profits, aviation (namely passenger charges) and non-aviation revenues (such as rent for shops at the airport, parking charges), must be taken into account and not only the number of passengers and the resulting passenger charges.
([40]) Germany refers to Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 59 ('*Charleroi* judgment').
([41]) 'Regionalökonomische Bedeutung und Perspektiven des Flugplatzes Altenburg-Nobitz' by Prof. Dr Richard Klophaus, September 2007.

to Altenburger Land to change its international profile and thus improve its economic and business structures. The study states that AOC, as a low-cost airport, will bring significant overall economic benefits.

(96) According to the study's calculations, by 2015 AOC would be expected to provide 658 jobs (a 95,3 % growth compared with 2006). In addition, 881 indirect jobs (157,6 % growth) and 438 induced jobs (184,4 % growth) would be created. The study furthermore emphasises the importance for regions to be nationally and internationally accessible, which has an enormous influence on the economic development of the region concerned.

(97) In this respect, according to the study, not only public contributions for the renovation and expansion of AOC and the related marketing costs, but also tax incomes for the *Land* of Thuringia and its municipalities should be considered. The study concludes that, not only microeconomic aspects, but also macroeconomic effects should be considered.

5.3. AIRPORT CHARGES AND PAYMENTS TO RYANAIR UNDER THE AIRPORT SERVICES AND MARKETING AGREEMENTS (MEASURE 3)

(98) Germany claims that neither the airport charges nor the marketing services agreements constitute State aid. Germany stresses that there is no link between the airport services agreements and the marketing services agreements, which should be assessed separately; marketing services agreements do not imply a reduction of revenues for the airport, but provide for advertising services.

The Ryanair services agreement

(99) Germany states that the airport took into consideration positive economic expectations arising from the development of the aviation business through Ryanair. In taking the decision to do business with the airline, the shareholders' meeting of 22 April 2003 considered the data ([42]) set out in Table 13 and concluded that, even in a conservative scenario (one daily flight with a 70 % load factor), a total annual result of […]* could be achieved with Ryanair.

Table 13

Expected revenues from Ryanair activities at AOC ([1]) **(2003)**

(in EUR)

Fee per passenger	[…]*
Number of passengers per aircraft, with a load factor of 70 % ([2])	104
Monthly revenues expected	[…]*
Monthly expenses for planned investments	12 138
Monthly result expected	[…]*
Annual result expected	[…]*

([1]) Conservative scenario of one daily flight.
([2]) Germany bases its forecasts on the assumption that the aircraft used by Ryanair in 2003 had a passenger capacity of 148.

([42]) *Umsatzaufstellung* Ryanair — This table was produced by Flugplatz Altenburg-Nobitz GmbH on the basis of various assumptions in terms of number of daily flights (1 to 10) and passenger load factor (70 % to 90 %).

(100) Monthly expenses taken into account in Table 13 include personnel costs, de-icing of the runway and snow clearing services. The Commission notes that the document presented to the shareholders' meeting of 22 April 2003 shows a total of annual investments of EUR 902 155. This sum was not taken into account in the forecasts shown in Table 13.

(101) Germany states that, according to the schedule of airport charges in force at the time, Ryanair paid a landing charge of […]* per aircraft and a passenger charge of […]* per passenger ([43]), charges that apply to all potential airline companies and that Flugplatz Altenburg-Nobitz GmbH considers to be reasonable taking into account the traffic and income generated by Ryanair for AOC.

(102) Germany states that the services to be provided by AOC under Annex A of the agreement of 3 March 2003 with Ryanair were not provided. The services included in Annex B and in the appendix to Annex B 'Reservations Facility' of the agreement of 3 March 2003 were provided at no extra charge for Ryanair.

Ryanair marketing agreements

(103) Germany explains that, according to the airport services agreement of 3 March 2003, Ryanair paid airport services fees to AOC according to the standard schedule of airport charges, for a total amount of EUR […]* from 2003 until 2011. According to the marketing agreement of 7 April 2003, AOC paid Ryanair a contribution for marketing services for a total of EUR […]* from 2003 until 2011. The difference in both payments results in a net payment by Ryanair to AOC of EUR […]* throughout the 2003-2011 period. As the total number of passengers in this period was 408 291 ([44]), Germany concludes that Ryanair paid a net fee to AOC of approximately EUR […]* per departing passenger.

Table 14

Invoices from and to Ryanair in the 2003-2011 period ([1])

(in EUR)

Year	Incoming invoices from Ryanair	Outgoing invoices from the airport	Number of passengers
2003	[…]*	[…]*	25 750
2004	[…]*	[…]*	37 160
2005	[…]*	[…]*	50 714
2006	[…]*	[…]*	44 580
2007	[…]*	[…]*	60 678
2008	[…]*	[…]*	62 876
2009	[…]*	[…]*	66 367
2010	[…]*	[…]*	55 641
2011	[…]*	[…]*	4 525
Total	**[…]***	**[…]***	**408 291**

([1]) Information provided by Germany.

(104) Germany states that, further to Ryanair's announcement that it would discontinue the routes from AOC in March 2011, the airport operator did not pay any further marketing contributions in February and March 2011.

([43]) These amounts stem from the monthly invoice sent by Flugplatz Altenburg-Nobitz GmbH to Ryanair in June 2009. Nevertheless, despite the request from the Commission, Germany did not provide any information on the monthly passenger and aircraft fees to be paid by Ryanair throughout the period 2003-2011.

([44]) In this regard, Germany provides passenger numbers which are different from the passenger numbers in the financial reports of the airport operator — see Table 1.

(105) Germany explains that marketing payments under the agreement of 21 September 2010 between Flugplatz Altenburg-Nobitz GmbH and Ryanair were paid by private companies after they agreed to the maintaining of Ryanair operations at AOC. A report from the managers of the company in 2011 ([45]) states that the winter aviation season 2010/2011, which comprised only one route to London, had only been made possible through the support of regional companies.

(106) Germany argues that Ryanair provided publicity for AOC and the region on its website. This website is the second most popular European website after the Google website and is therefore priced accordingly. An adword on Google costs per click between EUR 0,05 and EUR 2,00. Germany calculates that 100 000-150 000 annual Ryanair passengers at AOC with an adword price of EUR 1 per click generate an advertising price of EUR 100 000-150 000 per year, assuming that each passenger makes only one click. Since passengers usually make not only one click but several and since there are passengers who already clicked without booking, the German authorities come to the conclusion that the marketing agreement concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair is based on a reasonable price that does not provide any advantage to Ryanair.

(107) According to Germany, Ryanair organised the advertising measures described in Table 15.

Table 15

Marketing payments by AOC to Ryanair

Period	Amount	Objective
2003	EUR 50 000-150 000 […]*	Print advertisements in the *Leipziger Volkszeitung*
2004	EUR 25 000-125 000 […]*	Print advertisements in the *Leipziger Volkszeitung*
May 2007-March 2008	EUR 75 000-175 000 […]*	Newspaper ads, direct mailing and other publicity measures
May 2008-March 2009	EUR 50 000-150 000 […]*	Newspaper ads, direct mailing and other publicity measures
Total (2003-March 2009)	**EUR 225 000-325 000 […]***	

(108) Germany claims that the success fees do not constitute an advantage for Ryanair, since they are a market-compliant payment for marketing activities undertaken by Ryanair. According to Germany, marketing measures were successful since passenger numbers rose from 25 000 (2002) to 140 000 (2009), which led to a rise in overall income from EUR 316 000 to EUR 1,12 million, while income from airport charges rose from EUR 132 000 to EUR 530 000 and income from parking rose from zero to EUR 263 000.

(109) Germany claims that payments under the marketing services agreements do not constitute State aid, for the following reasons:

(a) Germany stresses that, contrary to the assertions of the Commission in the opening decision ([46]), the relevant ministry had no say in the conclusion of the agreements, except where infrastructure measures were concerned. Paragraph 43 of LuftVZO ([47]) does not mean that approval by the ministry was necessary.

(b) The fact that the local chamber of commerce backed AOC ([48]) only shows that the private market was in favour of the Ryanair connections.

([45]) Entwicklungskonzept der Flugplatz Altenburg-Nobitz GmbH, 9 September 2011.
([46]) See Commission's opening decision, recitals 133-134.
([47]) *Luftverkehrs-Zulassungs-Ordnung* — German Air Transport Licensing Regulation — See Commission's opening decision, recital 134.
([48]) See Commission's opening decision, recital 137.

(c) Germany states that marketing payments made by Flugplatz Altenburg-Nobitz GmbH to Ryanair do not constitute start-up aid under the 2005 Aviation Guidelines, but are simply commercial contractual agreements falling outside the field of State aid.

6. **COMMENTS FROM INTERESTED PARTIES**

6.1. COMMENTS FROM RYANAIR

Imputability to the state

(110) Ryanair argues that State aid to airports should not be imputable to Ryanair. A presumption of transfer of State aid by airports to airlines would be in breach of EU law. This presumption discriminates against public airports, while competition rules should apply without distinction to public and private undertakings. Ryanair claims that the evidence used by the Commission in order to show imputability to the state is not sufficient. The evidence may reflect the public authorities' interest in the airport's commercial relations and future, but does not prove any actual involvement of any of the public authorities in the airport's negotiations and agreements with Ryanair. Evidence that the ministries of the *Land* of Thuringia were actually opposed to the agreements with Ryanair would indicate that, at the very least, a more robust examination by the Commission of the imputability of the Ryanair agreements to the state is required.

(111) Ryanair submits that the question is not whether the state should have invested its money elsewhere but whether the state confers an advantage on an airline which it would not have obtained otherwise. Ryanair has merely negotiated terms with public airports similar to what it was able to obtain at comparable private airports.

The application of the market economy investor principle

(112) Ryanair submits that it is not an indirect recipient of State aid. As long as the terms of a commercial relationship between Ryanair and an airport can be justified under the market economy investor principle (hereinafter: 'MEIP'), any recovery obligation cannot extend to Ryanair. Ryanair argues that the MEIP should be applied to any case of an alleged grant of State aid to Ryanair by publicly owned airports. Indeed, according to the airline, there is no economic or legal justification for the exclusion of public airports from the MEIP and the Commission has applied the MEIP to agreements involving financing of major public infrastructure in other modes of transport, such as public seaports. The airport is exercising an economic function in entering into agreements. In addition, private and public sector airports compete in the market and contracts between airlines and airports can be profitable for the latter.

(113) Ryanair thinks that an efficiency assessment should not take into account cash injections for public remit investments, should consider incremental costs and not sunk costs and should, lastly, be made against the benchmark of a typically well-run airport. Ryanair argues that if a regional airport believes that an agreement will help improve its efficiency, a deal could be profitable even if it appears to involve below-cost pricing at the time of signing. Inefficient and underutilised airports can be expected to become profitable only once they achieve economies of scale and network externalities, the time frame for which can last 25 to 30 years. Low-fare airlines are ideally positioned to provide a significant increase in revenues to regional airports, usually without any need for new infrastructure or other investments. In support of this, Ryanair cites the UK Civil Aviation Authority's decision of 27 May 2011 recognising low-fare airlines' less costly reliance on airport services.

(114) Ryanair argues that sunk costs should be disregarded in the application of the MEIP, both in a comparator analysis and in a cost analysis. Ryanair states that a private investor operating AOC from 1992 onwards would have to consider both the infrastructure and the fixed operating costs of the airport as sunk costs. Realistically, there was no way to recover such costs, given the AOC's low commercial appeal and very limited market power.

Under such circumstances, the acceptance of any alternative scenario offering better, or simply less onerous, prospects to the airport owner(s) than the counterfactual of doing nothing or closing the airport at a potentially significant cost, would be fully consistent with the market economy investor principle.

(115) Ryanair also stresses that the specific costs linked to Ryanair have to be considered separately from the costs incurred by the airport, but may be overall lower than the revenues deriving from the positive network externalities generated by Ryanair's activities at the airport.

The studies by a consultancy firm acting for Ryanair

(116) Ryanair states that the fee agreement with AOC fulfils the requirements of the market economy investor principle. To that end, Ryanair provided the Commission with two reports prepared by a consultancy firm. These studies compare the deal in question with other fee agreements signed between Ryanair and airports which are either majority privately owned and funded, or operating as market economy investors in a situation that is sufficiently similar to AOC.

(117) Ryanair explains the method applied in the reports for comparing the airports as follows: the analysis was only made based on other Ryanair contracts, because Ryanair has different operating modes compared with most other carriers, namely no use of air bridges, buses or lounges, no transfer flights, turnaround time of 20 minutes and mostly carry-on luggage. In addition, only airports that are operated according to a market economy investor logic were included in the scope of the study. Airports that may have received substantial State aid support were ruled out. As a result, around 15 airports in Ryanair's network meet these criteria and were included in the scope of the study.

(118) The first report considers […]* to be the most appropriate comparator airport. The report states that 'ideally, the comparator airport that is selected for the purposes of the analysis would be of a similar size to Altenburg Airport. Although it has not been possible to find a comparator airport that is very similar to Altenburg Airport across all relevant dimensions, […]* Airport is sufficiently similar for the purposes of the analysis presented here'. The second report extended the comparator set to […]* airports and compared charges at these airports between 2003/2004 and 2010/2011, on both a per passenger and a per turnaround basis.

(119) The reports conclude that the overall level of charges paid by Ryanair to AOC is on average higher than, or in line with, the comparable level of charges paid by the airline over the period under investigation at the comparator airports. This suggests that the charges paid by Ryanair at AOC under the various agreements are compatible with a level of charges that would have been offered to Ryanair by an airport-owning market economy investor in similar circumstances.

(120) Ryanair claims that airport charges should be regarded at levels corresponding to the marginal costs rather than looking at the average variable costs or average total costs.

(121) Ryanair stresses that AOC's agreements with Ryanair and AMS should be assessed separately and both companies cannot be considered a single beneficiary of the alleged State aid. The agreements were separate, negotiated independently, relate to different services and were not subject to any linkage that would justify their consideration as a single source of alleged State aid. The conclusion of a marketing agreement with AMS was not a condition for the operation of routes by Ryanair to and from an airport. Based on their own perception of their marketing needs, many airports served by Ryanair do not conclude agreements with AMS. Ryanair stresses that the purchase of marketing services at market rates should be considered separately from a related airport-airline contractual agreement.

(122) Ryanair further explains that there is no suggestion that an airline committing to deliver a similar number of passengers and/or aircraft rotations would not have received similar 'reduced fees'. The Commission also does not examine whether an airline offering similar commitments would have obtained a similar level of fees from a comparable private airport.

(123) As to the value of marketing, Ryanair claims that marketing space on Ryanair's website is a limited resource and demand for that space is high, including from businesses other than airports. The website currently records approximately 4,5 billion page views per year. Even legacy airlines now realise the value of their website for marketing and advertising. On the other hand, many airports make the commercially rational choice to build up a brand by advertising on *ryanair.com* or on other airline websites. This increased brand recognition can benefit airports in a number of mutually reinforcing and complementary ways. AOC is far less renowned internationally than either Aéroports de Paris or Heathrow Airport, and it therefore needs to invest in advertising to improve its brand recognition and maximise the share of inbound passengers.

(124) Ryanair provides an analysis prepared by the consultancy firm comparing the prices charged by AMS for web marketing services with prices charged for similar services by other travel-related websites. The analysis benchmarks the prices charged by AMS in its first 2005 rate card against comparable services provided by travel websites at that time, and also compares prices in AMS' current (2013) rate card with the prices of comparable services sold by other travel-related websites. The analysis concludes that, in both periods, prices charged by AMS for advertisements on *ryanair.com* were either lower than the average, or within the mid-range of rate card prices charged by websites in the comparator sets. This conclusion confirms, according to Ryanair, that public airports' arrangements with AMS meet the market economy operator test.

(125) Ryanair also provides evidence of the services provided to the airport through various screenshots which show that services provided under contracts with AMS were monitored. These screenshots were generally provided to the airport contracting with AMS to demonstrate the activation of the purchased services on *ryanair.com*. Ryanair stresses the value of the AMS services provided to airports and is of the opinion that benefits to airports of entering into deals with AMS should be seriously quantified.

(126) Without prejudice to Ryanair's position that the AMS agreement and the air services agreement (hereinafter 'ASA') should be treated separately, Ryanair provides a market economy operator profitability analysis carried out by the consultancy firm encompassing both the air services agreement concluded between Ryanair and the airport and marketing agreements concluded between AMS and the airport. According to Ryanair, this analysis should help the Commission in its approach to considering the ASA jointly with the AMS agreements, by considering how AMS could be incorporated within a joint AMS-ASA profitability analysis.

(127) The consultancy firm concludes that the cash-flow approach is an appropriate method for incorporating the value of AMS within a joint AMS-ASA profitability assessment. This approach captures the aggregated incremental profits that accrue to the airport as a result of signing the ASA, as well as the benefits of advertising through the AMS agreement. Under this approach, expenditure by the airport on AMS could be treated as an incremental operating expense within the discounted cash flow profitability analysis. This approach also takes into account the benefits of both marketing activities arising from the AMS agreements and through the ASA, for the duration of the agreement and beyond the scheduled end of the ASA, as marketing activities contribute towards enhancing brand value, and are likely to generate future business and profits.

(128) As a conclusion from this study, Ryanair stresses that, in so far as the Commission continues to treat ASA and AMS agreements together, it should apply the principles set out by the consultancy firm to the case at issue, in order to properly apply the market economy operator profitability analysis to the investigation of both ASA and AMS agreements.

(129) Furthermore, Ryanair submitted a series of notes prepared by the consultancy firm, and an analysis prepared by Professor Damien P. McLoughlin.

Identifying the market benchmark in comparator analysis for MEO ([49]) tests ([50])

(130) The consultancy firm believes that the Commission's approach of only accepting comparator airports in the same catchment area as the airport under investigation is flawed. The consultancy firm argues that market benchmark prices obtained from comparator airports are not tainted by State aid given to surrounding airports. Therefore, it is possible to robustly estimate a market benchmark for the MEO tests, as:

(a) comparator analyses are widely used for MEO tests outside the field of State aid;

(b) companies affect each other's pricing decisions only to the extent that their products are substitutes or complements;

(c) airports in the same catchment area do not necessarily compete with each other, and the comparator airports used in the reports submitted face only limited competition from State-owned airports within their respective catchment areas (less than one third of commercial airports within the catchment areas of the comparator airports are fully state- owned, and none of them were subject to State aid investigations, as at April 2013);

(d) even where comparator airports face competition from state-owned airports within the same catchment area, there may be reasons to believe their behaviour is in line with the MEO principle (for example, where there is a large private ownership stake or where the airport is privately managed);

(e) MEO airports will not set prices below incremental cost.

Principles underlying profitability analysis for MEO tests ([51])

(131) The consultancy firm argued that the profitability analysis undertaken in its reports and submitted to the Commission follows the principles that would be adopted by a rational private sector investor and reflects the approach apparent from Commission precedents. The principles underlying the profitability analysis are:

(a) the assessment is undertaken on an incremental basis;

(b) an *ex ante* business plan is not necessarily required;

(c) for an uncongested airport, the single-till approach is an appropriate pricing methodology;

(d) only those revenues associated with the economic activity of the operating airport should be considered;

(e) the entire duration of the agreement, including any extensions, should be considered;

(f) future financial flows should be discounted in order to assess profitability of the agreements;

(g) the incremental profitability of Ryanair agreements for the airports should be assessed on the basis of estimates of the internal rate of return or net present value (NPV) measures.

([49]) Market economy operator.
([50]) Ryanair State aid cases, prepared for Ryanair by the consultancy firm, 9 April 2013.
([51]) See footnote 50.

Analysis of Professor Damien P. McLoughlin ([52]) — Brand-building: why and how small brands should invest in marketing

(132) This paper aims to set out the commercial logic underlying regional airports' decisions to buy advertising on *ryanair.com* from AMS. It argues that there are a large number of very strong, well-known, and frequently used airports. Weaker competitors must overcome consumers' static buying behaviour to expand their business. Smaller regional airports need to find a way to consistently communicate their brand message to as wide an audience as possible. Traditional forms of marketing communication require expenditure beyond their resources.

Comments regarding payments to AMS

(133) Ryanair disagrees with the Commission's assessment that payments to AMS represent a cost for the airport, as this approach disregards the value of AMS services to the airport. Ryanair furthermore believes that the purchase of valuable marketing services at market rates should be considered separately from a related airport-airline contractual arrangement for the purposes of the market economy operator analysis. To support its analysis, Ryanair submits a study by the consultancy firm comparing benchmark prices charged by AMS as against prices for comparable services offered by other travel websites ([53]). The study concludes that prices charged by AMS were either lower than the average or within the mid-range of prices charged by comparator websites. Ryanair concludes from this that AMS prices are in line with market prices and the decision by a public airport to purchase AMS services is in line with the market economy operator test. Ryanair further provides evidence of the services provided to airports under AMS contracts, to show the value of these services to airports.

(134) Ryanair asks the Commission to reassess its approach regarding AMS contracts so far. Ryanair believes that AMS arrangements should be considered separately from Ryanair's airport services arrangements and be subject to a separate market economy operator test. Should the Commission insist on including AMS arrangements and Ryanair airport services arrangements in a joint market economy operator test, the value of AMS services to the airport should not be disregarded.

(135) The report by the consultancy firm of 20 December 2013 on AMS prices refers to the conclusions of earlier reports submitted outlining the importance of advertising for small brands, which confirm that Ryanair is a strong pan-European brand capable of attracting a premium for its advertising services. The AMS rates are compared with a sample taken at the same time of website advertising prices with reference to advertisements of equal size for the 2004-2005 period, i.e. when the AMS rate card was first introduced, and for 2013. *ryanair.com* has more than twice as many monthly visitors as the next most popular travel site, and visitors are more likely to enter into other e-commerce transactions. These unique characteristics combined with high brand awareness allowed the airline to charge a premium.

(136) The comparison took place between advertisements of equal size determined by available data and placed on the homepage of each website. Only rate card prices were compared due to the lack of transparency relating to special offers and discretionary discounts, which are however standard commercial practice. A rate card price is quoted in terms of price per thousand impressions, namely the price to be paid for every thousand times the advertisement is viewed by visitors to the website. Prices for web advertisements vary according to their size, measured in pixels, and location on a webpage. The primary homepage advertising service offered on *ryanair.com* from 2004 to 2005 was a banner of 468 by 60 pixels. Banners are usually located in the centre top section of a webpage. For the period 2004-2005, the 2005 AMS rate card price for advertising in the form of banners was compared with that of 54 European travel websites.

([52]) Prepared for Ryanair, 10 April 2013.
([53]) 'Are prices set by AMS in line with the market rate?' Prepared for Ryanair, 20 December 2013.

(137) For 2013, two other types of advertisement are considered: skyscrapers of 120 by 600 pixels and mid page units of 300 by 250 pixels. Skyscraper advertisements are tall and located along the side of a webpage, while mid page units usually sit within online editorial content, making them highly visible. The AMS rate card prices for skyscraper advertisements and mid page units are compared with those of 22 travel websites and 135 other websites. For both periods and across sectors, AMS rates are found to be lower than or within the range of prices charged by websites in the comparator sets.

How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?

(138) Ryanair submitted a report prepared by the consultancy firm concerning the principles that it believes should apply to a market economy operator profitability test encompassing both the air services agreements concluded between Ryanair and airports and the marketing agreements concluded between AMS and the same airports ([54]). Ryanair emphasises that this does not prejudice its position that AMS agreements and air service agreements should be subject to separate market economy operator tests.

(139) The report states that AMS-associated income should be included on the revenue side in a joint profitability analysis where AMS expenditure is included on the cost side. The report proposes a cash-flow-based method in which expenditure on AMS is treated as an incremental operating expense. The report submits that marketing activities contribute to creating and enhancing brand value, which in turn is likely to generate business and profits over the duration of the marketing agreement, and also beyond. An agreement with Ryanair would attract other airlines to the airport. This would in turn attract commercial operators and increase the airport's non-aeronautical revenues ([55]). In so far as the Commission undertakes a joint profitability analysis, these benefits should be taken into account by treating expenditure on AMS as an incremental operating expense, with incremental profits calculated net of AMS payments.

(140) In addition, a terminal value should be included in projected incremental profits at the end of the air services agreement in order to record value accruing beyond expiry of the agreement. The terminal value can be adjusted by a conservative assumption as to the probability of the agreement being renewed with Ryanair or similar terms being agreed with other airlines. This will allow an estimation of a lower bound for the benefits arising jointly out of the AMS and air services agreements, taking into account the uncertainty of incremental profits beyond the expiry of the air services agreement.

(141) To support this approach, the report submits a summary of the results of studies on the effect of advertising on brand value. These studies recognise that advertising can build brand value and improve customer loyalty. In particular, advertising on *ryanair.com* increases brand exposure for an airport. Specifically, smaller regional airports aiming to increase their traffic base can build their brand value by entering into advertising agreements with AMS ([56]).

(142) The report suggests that the cash-flow approach is to be preferred to a capitalisation approach under which AMS expenditure would be treated as capital expenditure on an intangible asset (namely the brand value of the airport). Marketing expenditure would be capitalised as an intangible asset and then amortised over its useful asset life, with a residual value at the end of the scheduled expiry of the air services agreement. This approach would, however, not capture additional benefits to the airport resulting from signing the air services agreement with Ryanair. Furthermore, estimating intangible asset value is difficult due to brand expenditure and the length of useful asset life.

([54]) 'How should AMS agreements be treated within the profitability analysis as part of the market economy operator test?' Prepared for Ryanair, 17 January 2014.

([55]) According to a report by York Aviation (2007) '*Social benefits of low fare airlines in Europe*', Ryanair made Eindhoven Airport attractive as a base for other low-cost carriers.

([56]) Specific reference is made to a report by Professor McLoughlin (2013) which was submitted by Ryanair on 13 April 2013 titled '*Brand building: why and how small brands should invest in marketing*'.

(143) Finally, the cash-flow approach is argued to be in line with State aid and non-State aid precedents from the Commission. Here, the case of BayernLB ([57]) is cited, where the Commission indicated it would use a dividend discount valuation model to estimate cash flows and then assign a terminal value based on projected dividend growth, as is the margin squeeze case relating to Telefónica ([58]), where the Commission incorporated a terminal value into its discounted cash flow analysis.

6.2. COMMENTS FROM AIRPORT MARKETING SERVICES (AMS)

(144) Airport Marketing Services defines itself as a subsidiary of Ryanair with a real commercial purpose, created in order to develop an activity that does not belong to the core business of Ryanair. It is used by Ryanair as an intermediary to sell advertising space on its website. In principle, AMS's marketing agreements with airports are negotiated and concluded separately from Ryanair's agreements with the same airports.

(145) AMS states that it has not been the beneficiary of State aid and that the airport acted in line with the market economy investor principle towards AMS. AMS argues that the market economy investor principle is met since the rates at which advertising space is provided by AMS, and the volumes in which it is acquired, do not discriminate between public and private advertisers. Both public and private bodies compete to access the limited advertising space on *ryanair.com*.

(146) AMS states that marketing agreements were negotiated with commercial value at market price following a business rationale. Many airports, both regional and hub, choose to advertise on Ryanair's or other websites to increase their brand recognition. This increased brand recognition can benefit airports in a number of ways. For example, it may attract inbound passengers from the airline on whose site the airport is advertising. Inbound passengers generate non-aeronautical income, since foreign passengers are far more likely to spend money at an airport for souvenirs, local products, car rental, restaurants, etc.: revenues which account for almost half of airports' income from non-aeronautical activities.

(147) This is particularly the case for AOC, which had no regular passenger traffic when Ryanair started operating its Altenburg-London route. Activities likely to generate non-aeronautical revenues had not been developed at that time. Marketing activities were therefore particularly important to maximise the share of inbound passengers in the total number of passengers committed to by Ryanair, and to encourage the establishment of non-aviation commercial activities at the airport.

(148) The Ryanair website has especially valuable features for marketing: it is one of the most popular travel websites in the world; the Ryanair brand and website address are well known; its contents are attractive with a bounce rate of […]* only; the average duration of each visit to the website is extremely long and it specifically targets potential passengers to that airport. These website characteristics are reflected in the marketing fees charged to AOC.

(149) AMS states that its marketing fees were established at market price. AMS does not discriminate between airport and non-airport clients. Prices charged by AMS are based on objective criteria and are transparently indicated on its website ([59]). Prices charged by AMS to AOC were consistent with its rate card. By way of comparison, a one-page advertisement by the airport in the *Daily Telegraph* newspaper would cost about EUR 2 385 000 for 45 days (GBP 46 000 per day). In addition, the advertisements provided by AMS on Ryanair's website are 'fixed', whereas those provided on numerous other internet sites tend to 'rotate'.

([57]) European Commission (2005) NN72/05 Capital increase BayernLB, Germany, paragraphs 27-29.
([58]) Commission Decision of 4 July 2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 — *Wanadoo España* v *Telefónica*), paragraphs 360 and 363.
([59]) www.airportmarketingservices.com

(150) The two-year duration of service provision pursuant to the 2008 marketing agreement with AMS allowed the airport to pay for the advertising services based on website traffic in 2007. Similarly, the 2010 marketing agreement was based on assumptions regarding website traffic in 2009. Historical data available show that the number of visitors to Ryanair's website has increased significantly in recent years.

(151) AMS comes to the conclusion that it has not benefited from State aid and that Flugplatz Altenburg-Nobitz GmbH acted in line with the market economy investor principle towards AMS.

6.3. COMMENTS FROM LUFTHANSA

(152) Lufthansa notes that the 2010 and 2011 annual reports of Flugplatz Altenburg-Nobitz GmbH reveal annual losses amounting to respectively EUR 567 000 and EUR 437 000, showing that the company is still not profitable despite public support. According to Lufthansa, shareholders' annual contributions are made in two different forms:

(a) The budget plan of Landkreis Altenburger Land of 2014 states that Flugplatz Altenburg-Nobitz GmbH received annual additional contributions of EUR 228 000 under Section 24 of its Articles of Association.

(b) Flugplatz Altenburg-Nobitz GmbH also received non-repayable contributions amounting to EUR 2 406 000 between 2009 and 2011. According to the annual reports, these contributions are safeguarding the company's solvency. These contributions are also provided for 2014, according to the budget plan of Landkreis Altenburger Land (EUR 350 000 for 2014). All in all, shareholders' contributions amounted to EUR 409 000 for 2014 and EUR 174 000 for 2013.

(153) Concerning the current investigations, Lufthansa observes that the infrastructure has obviously been built exclusively for Ryanair, as agreed in the agreement with Ryanair. Lufthansa states that a private investor would only have acted in this way if Ryanair had committed itself in return to serve the airport for a certain number of years.

(154) Lufthansa also claims that public rescue aid was provided to Flugplatz Altenburg-Nobitz GmbH between 2003 and 2011, because the airport charges were not sufficient to cover operating costs. Lufthansa defines the company as 'a firm in difficulty' according to the Community guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ([60]), which were not complied with, since the aid was not notified. This aid is therefore incompatible with the internal market.

(155) With regard to airport charges and marketing support, Lufthansa observes that substantial aid was provided to Ryanair in the form of advantageous charges and marketing support. Lufthansa claims that these advantages are incompatible with the internal market, since the compatibility criteria of the 2005 guidelines could not be applied as these do not apply in cases where permanent and continual operating aid is provided. The 2014 guidelines can also not be applied since they concern only start-up aid to airlines which has been notified or granted after the entry into force of the guidelines. Even if the 2014 guidelines could be applied, the criteria for compatibility of start-up aid to airlines would not be fulfilled.

6.4. COMMENTS FROM BUNDESVERBAND DER DEUTSCHEN FLUGGESELLSCHAFTEN

(156) Regarding the application of the 2014 guidelines, Bundesverband der deutschen Fluggesellschaften ('BDF') does not agree with the application of the 2014 guidelines to non-notified operating aid granted before the publication of the guidelines, since such an application would be contrary to the aim of preventing the distortion of competition and creating a level playing field in the internal market. According to BDF, such an application would constitute an advantage for those undertakings which acted in conformity with the guidelines in force before 4 April 2014. The new guidelines would legalise illegal behaviour retroactively in the opinion of BDF. The start-up aid to Ryanair and the investment aid to Flugplatz Altenburg-Nobitz GmbH should therefore be evaluated as non-notified aid on the basis of the law applicable at the relevant time.

([60]) OJ C 249, 31.7.2014, p. 1.

7. **COMMENTS FROM GERMANY ON INTERESTED PARTIES' COMMENTS**

7.1. COMMENTS FROM GERMANY ON THE COMMENTS FROM RYANAIR

(157) As regards the report of the consultancy firm, Germany observes that it implies that Germanwings may have served AOC. However, Germany certifies that Germanwings has never served the airport.

(158) With regard to the comments from Ryanair, Germany states that the authorities of the *Land* of Thuringia were not involved in the negotiations between the airport and Ryanair/AMS on the conclusion of the agreements.

(159) Regarding the marketing agreements between Ryanair and AOC, Germany fully backs Ryanair's position, according to which these marketing agreements comply with the market economy investor principle and therefore do not involve State aid. In particular, Germany agrees with the conclusion of the last report of the consultancy firm provided by Ryanair on 20 December 2013 and states that payments made to AMS/Ryanair were appropriate to the service provided, in the context of a normal service agreement on a business matter.

7.2. COMMENTS FROM GERMANY ON THE COMMENTS FROM LUFTHANSA

(160) Germany submits that the comments from Lufthansa do not add any new information to the ongoing investigations and that the Commission already has all relevant information in this case.

(161) Germany rejects a number of statements from Lufthansa which are erroneous according to Germany.

(a) According to Germany, AOC was not built and operated exclusively for Ryanair. In this regard Germany refers to its comments and to the long-term investment plan for Flugplatz Altenburg-Nobitz GmbH.

(b) Also, Germany emphasises that the infrastructure is open for anyone to use on a non-discriminatory basis. Since 2001, Air Berlin and Air Omega have also used the airport regularly.

(c) The results of Flugplatz Altenburg-Nobitz GmbH were improved through the contracts with Ryanair. Therefore, a private investor would also have concluded these agreements.

(d) Such decisions are usual for undertakings like Flugplatz Altenburg-Nobitz GmbH. For example, it was also checked in 2008 and 2009 whether a pilot training company could start using AOC, but the contract was not concluded because the infrastructure requirements of the company could not be met at that time. Another example is the decision taken in December 2010 not to conclude new agreements with Ryanair.

(e) The business model of Flugplatz Altenburg-Nobitz GmbH was changed to general aviation on the basis of the KE-Consult study. This reduced the amount of public contributions needed.

(162) Furthermore, Germany states that, as the supervisory board of Flugplatz Altenburg-Nobitz GmbH decided in December 2013 to include a private investor, public contributions can be reduced further. Moreover, given the new orientation of the airport, which will no longer be served by charter or scheduled flights, AOC should soon fall outside the application of State aid rules.

(163) Germany argues that, according to the 2005 guidelines, AOC belongs to airport category D, with a maximum of 150 000 passengers per annum. Therefore, the airport is too small to compete with other airports, let alone distort competition. There is, accordingly, no effect on trade between Member States. Germany rejects the allegations of Lufthansa regarding alleged aid granted to Ryanair. Germany also rejects the claim that aid was granted to Ryanair through airport charges and marketing support and refers to its earlier comments in this regard.

(164) Lastly, Germany refers to a press release from the European Commission dated 19 January 2005 ([61]) which confirms that an aid scheme for the construction and development of regional airports in structurally and economically weak regions is compatible with the internal market.

([61]) http://europa.eu/rapid/press-release_IP-05-58_de.htm?locale=FR

8. **ASSESSMENT**

8.1. EXISTENCE OF AID

(165) Pursuant to Article 107(1) TFEU '… any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

(166) The criteria provided for in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measures in question constitute aid within the meaning of Article 107(1) TFEU, all of the following conditions need to be fulfilled. Specifically, the financial support must:

(a) be granted by the state or through state resources;

(b) favour certain undertakings or the production of certain goods;

(c) distort or threaten to distort competition; and

(d) affect trade between Member States.

Concept of undertaking and economic activity

(167) According to settled case-law, the Commission must first establish whether Flugplatz Altenburg-Nobitz GmbH is undertaking within the meaning of Article 107(1) TFEU. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed ([62]). Any activity consisting in offering goods or services on a given market is an economic activity ([63]).

(168) In its *Leipzig/Halle Airport* judgment the Court of Justice confirmed that the operation of an airport for commercial purposes and the construction of the airport infrastructure constitute an economic activity ([64]). Once an airport operator engages in economic activities by offering airport services against remuneration, regardless of its legal status or the way in which it is financed, it constitutes an undertaking within the meaning of Article 107(1) TFEU, and the Treaty rules on State aid can therefore apply to advantages granted by the state or through state resources to that airport operator ([65]).

(169) Regarding the moment in time as from which the construction and operation of an airport becomes an economic activity, the Commission would point out that the gradual development of market forces in the airport sector does not allow a precise date to be determined. However, the European Courts have recognised the evolution in the nature of airport activities. In *Leipzig/Halle Airport*, the General Court held that from 2000 onwards the application of State aid rules to the financing of airport infrastructure could no longer be excluded. Consequently, from the date of the judgment in *Aéroports de Paris* (12 December 2000), the operation and construction of airport infrastructure must be considered an economic activity.

(170) As assessed in recitals 168 and 169, the operation of an airport is an economic activity. Competition takes place, on the one hand, between airports to attract airlines and the corresponding air traffic (passengers and freight), and, on the other hand, between airport managers, which may compete between themselves to be entrusted with the management of a given airport. Moreover, in particular with respect to low-cost carriers and charter operators, airports that are not located in the same catchment areas and even in different Member States may also be in competition with each other to attract those airlines.

([62]) Case C-35/96 Commission v Italy [1998] ECR I-3851; Case C-41/90 Höfner and Elser [1991] ECR I-1979; Case C-244/94 Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013; Case C-55/96 Job Centre [1997] ECR I-7119.

([63]) Case 118/85 *Commission* v *Italy* [1987] ECR 2599; Case 35/96 *Commission* v *Italy* [1998] ECR I-3851.

([64]) *Leipzig/Halle* judgment, in particular paragraphs 93-94; confirmed by Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* [2012], not yet published; see also Case T-128/89 *Aéroports de Paris* v *Commission* [2000] ECR II-3929, confirmed by Case C-82/01P *Aéroports de Paris* v *Commission* [2002] ECR I-9297 and Case T-196/04 *Ryanair* v *Commission* (hereinafter: '*Charleroi* judgment') [2008] ECR II-3643.

([65]) Cases C-159/91 and C-160/91 *Poucet* v *AGV* and *Pistre* v *Cancave* [1993] ECR I-637.

(171) The Commission notes that the airport infrastructure in question in the present Decision is to be operated on a commercial basis by the airport operator, Flugplatz Altenburg-Nobitz GmbH. Since the airport operator will charge users for the use of this infrastructure, the latter is commercially usable. It follows that the entity using this infrastructure constitutes an undertaking for the purposes of Article 107(1) TFEU.

Public policy remit

(172) However, not all the activities of an airport operator are necessarily of an economic nature ([66]). The Court of Justice ([67]) has held that activities that normally fall under state responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the rules on State aid. Such activities include, for example, security, air traffic control, police, customs, etc. The financing of these activities has to be strictly limited to offsetting the costs to which they give rise and may not be used instead to fund other economic activities ([68]).

(173) Therefore, the financing of activities falling within the public policy remit, or of infrastructure directly related to these activities in general does not constitute State aid ([69]). At an airport, activities such as air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference and the investments relating to the infrastructure and equipment necessary to perform these activities are considered in general to be of a non-economic nature ([70]).

(174) However, public financing of non-economic activities necessarily linked to the carrying out of an economic activity must not lead to undue discrimination between airlines and airport managers. Indeed, it is settled case-law that there is an advantage if public authorities relieve undertakings of the costs inherent to their economic activities ([71]). Therefore, if in a given legal system it is normal that airlines or airport operators bear the costs of certain services, whereas some airlines or airport operators providing the same services on behalf of the same public authorities do not have to bear those costs, the latter may benefit from an advantage, even if these services are themselves considered to be non-economic. Therefore, an analysis of the legal framework applicable to the airport operator is necessary in order to assess whether under that legal framework airport operators or airlines are required to bear the cost of the provision of some activities that might be non-economic in themselves but are inherent in the deployment of their economic activities.

(175) Germany explains that the public subsidies for infrastructure investments mentioned at recital 71 are exclusively linked to non-economic activities: Germany includes within these non-economic activities security investments and investments into public and aviation safety. In particular, Germany points out that security and policing activities, fire protection measures, public and operational safety, meteorological services and flight security are part of the public policy remit.

(176) The relevant legal framework in Germany is in particular defined by §8 *Luftsicherheitsgesetz* (Air Security Law), which regulates airport security measures, and §27c(2) *Luftverkehrsgesetz* (Air Traffic Law), which regulates measures ensuring operational safety, air traffic control and air safety measures.

(177) The Commission is of the view that measures pursuant to §8 *Luftsicherheitsgesetz*, measures pursuant to §27c(2) *Luftverkehrsgesetz*, meteorological services, and the fire brigade can, in principle, be considered to constitute activities falling within the public policy remit.

([66]) Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.
([67]) Commission Decision N309/2002 of 19 March 2003 on Aviation security — compensation for costs incurred following the attacks of 11 September 2001.
([68]) Case C-343/95 *Calì & Figli* v *Servizi ecologici porto di Genova* [1997] ECR I-1547; Commission Decision N309/2002 of 19 March 2003; Commission Decision N438/2002 of 16 October 2002, Aid in support of the public authority functions in the Belgian port sector.
([69]) Commission Decision N309/2002 of 19 March 2003.
([70]) See, in particular, Case C-364/92 *SAT* v *Eurocontrol* [1994] ECR I-43, paragraph 30 and Case C-113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 71.
([71]) See, among others, Case C-172/03 *Wolfgang Heiser* v *Finanzamt Innsbruck* [2005] ECR I-01627, paragraph 36, and case-law cited.

(178) With respect to measures relating purely to operational safety, however, the Commission considers that ensuring safe operations at the airport is a normal part of the economic activity of operating an airport ([72]). Subject to a more detailed review with respect to specific activities and costs, the Commission finds that measures designed to ensure the safety of operations at the airport do not constitute activities falling within the public policy remit. Any undertaking wishing to operate an airport has to ensure the safety of the installations, such as of the runway and aprons.

(179) Regarding fire protection, the Commission observes that the payment of costs is subject to regional responsibilities and these costs are usually paid by the relevant regional authorities. The payment of these costs is limited to the extent necessary to cover them.

(180) As regards air traffic control and air safety measures, §27(d) *Luftverkehrsgesetz* provides that the costs related to the measures in §27(c) *Luftverkehrsgesetz* are covered by the State for a number of specific airports. Airports are eligible for cost coverage as 'recognised airports' pursuant to §27(d) *Luftverkehrsgesetz* if the Federal Ministry of Transport has recognised the necessity of air traffic control and air safety measures for security reasons and transport policy related interests ([73]). German airports which have not been recognised are not eligible for cost coverage pursuant to §27(d) *Luftverkehrsgesetz* and have therefore in principle to bear the costs related to the measures provided for in §27(c) *Luftverkehrsgesetz* themselves. These costs are inherent in the operation of the airports. Since some airports have to bear these costs themselves whereas other airports do not, the latter might be granted an advantage, even if control and air safety measures can be considered to be non-economic. The Commission notes that AOC is not one of the airports covered by §27d of that law, and finds that investments linked to air traffic control and air safety measures cannot qualify as public policy remit costs.

(181) With respect to measures pursuant to §8 *Luftsicherheitsgesetz*, it appears that Germany considers that all costs related to the measures prescribed therein may be borne by the relevant public authorities. The Commission notes, however, that pursuant to §8(3) *Luftsicherheitsgesetz* only the costs related to the provision and maintenance of premises and surfaces necessary for the performance of the listed activities pursuant to §5 *Luftsicherheitsgesetz* may be reimbursed. All other costs must be borne by the airport operator. Hence, to the extent that public financing granted to Flugplatz Altenburg-Nobitz GmbH thus relieved this undertaking of costs it had to bear pursuant to §8(3) *Luftsicherheitsgesetz*, that public financing is not exempt from scrutiny under EU State aid rules.

(182) To conclude, as regards infrastructure investments and operating expenses incurred between 2000 and 2011, the Commission accepts that expenses directly related to fire protection and the provision of meteorological services qualify as public policy remit expenses, in so far as the payment of these costs is strictly limited to what is necessary to perform these activities. As regards investments and operating costs linked to measures taken pursuant to §8 *Luftsicherheitsgesetz*, the Commission considers that only those costs for which the airport operator is entitled to reimbursement pursuant to §8(3) *Luftsicherheitsgesetz* qualify as public policy remit costs.

(183) With respect to investments linked to air traffic control and air safety measures pursuant to §27c(2) *Luftverkehrsgesetz*, and noting that AOC is not one of the airports covered by §27d of that law, the Commission finds that investments and operating costs linked to air traffic control and air safety measures cannot qualify as public policy remit costs. Investments and operating costs related to ensuring the operational safety of the airport do not, finally, qualify as public policy remit costs. In particular, this means that the investments for the modernisation and extension of the runway, as well as the installation of guard lights, etc., cannot be qualified as falling within the public policy remit.

([72]) Commission decision of 20 February 2014 in State aid case SA.35847 (2012/N) — *Czech Republic — Ostrava Airport*, not yet published in the Official Journal, recital 16.

([73]) §27(d)(1) Luftverkehrsgesetz: 'Flugsicherungsdienste und die dazu erforderlichen flugsicherungstechnischen Einrichtungen werden an den Flugplätzen vorgehalten, bei denen das Bundesministerium für Verkehr, Bau und Stadtentwicklung einen Bedarf aus Gründen der Sicherheit und aus verkehrspolitischen Interessen anerkennt'.

(184) In any case, regardless of the legal classification of those costs as falling within the public policy remit or not, it has been demonstrated that they must be borne by the airport operator, under the applicable legal framework. Accordingly, if the state paid for those costs, the airport operator would be relieved of costs that it should normally have incurred.

(185) Therefore, the Commission considers that the public funding provided to Flugplatz Altenburg-Nobitz GmbH in relation to the financing of infrastructure investments and operating losses relieves it from bearing costs that are inherent in its economic activity, with the exception of the public remit costs as set out in recitals 182 and 183. Financing from the *Land* of Thuringia set out in Table 7 to cover air traffic control and airport control services therefore cannot qualify as public remit activities, contrary to the opinion of Germany. Likewise, part of the infrastructure investments set out in Table 3 do not fall within the public policy remit, contrary to the opinion of Germany: this is in particular the case with the modernisation and extension of the runway.

8.1.1. **Measure 1: Financing of infrastructure investments in 2000-2011**

State resources and imputability to the State

(186) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ([74]). Local authority resources are subject to the application of Article 107 of the TFEU on state resources ([75]).

(187) In the present case, contributions to infrastructure investments in favour of Flugplatz Altenburg-Nobitz GmbH are financed out of the budget of public bodies, either its public shareholders ([76]), the *Land* of Thuringia or other public bodies, regional and local authorities. Hence they involve state resources and are also imputable to the state.

Economic advantage

(188) In order to verify whether an undertaking benefited from an economic advantage arising from the granting of funds on preferential terms, the Commission applies the criterion of the 'market economy investor principle'. According to that principle, funds put at the disposal of a company by the State, directly or indirectly, in circumstances which correspond to the normal conditions of the market, should not be classed as State aid ([77]).

(189) In the present case, the Commission has to assess whether the conditions for the public subsidies provided to Flugplatz Altenburg-Nobitz GmbH confer an economic advantage, which the recipient undertaking would not have obtained under normal market conditions.

(190) For the measure in question, the public contributions were granted to Flugplatz Altenburg-Nobitz GmbH 'for free' with no interest charged or repayment obligation ([78]). Therefore the contributions to infrastructure investments from the German public authorities relieved the company of the burden of completely financing the infrastructure itself either through bank loans or through equity funds. Therefore, those contributions confer an economic advantage on the airport.

Selectivity

(191) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the contributions to infrastructure investments were paid only to Flugplatz Altenburg-Nobitz GmbH. Thus, those contributions are selective measures within the meaning of Article 107(1) TFEU.

([74]) Case C-482/99 *France* v *Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.
([75]) Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.
([76]) See footnote 10.
([77]) Communication of the Commission to the Member States: application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/CEE to public undertakings in the manufacturing sector (OJ C 307, 13.11.1993, p. 3), paragraph 11. That communication deals with the manufacturing sector, but is applicable to the other economic sectors. See also Case T-16/96 *Cityflyer* [1998] ECR II-757, paragraph 51.
([78]) Reimbursements occurred only in the specific cases when the public contribution in question had not been fully used for the investment it was intended for.

Distortion of competition and effect on trade

(192) If aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be deemed to be affected by that aid. In accordance with settled case-law ([79]), for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings in markets open to competition.

(193) As set out above, the operation of an airport constitutes an economic activity and competition takes place between airports to attract passengers and airlines. Flugplatz Altenburg-Nobitz GmbH competes with other undertakings on a market open to competition. The economic advantage received strengthens its position vis-à-vis its competitors in the European market for airport service providers.

(194) Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between Member States.

Conclusion

(195) For the reasons set out above, the Commission concludes that the contributions by the German regional and local public authorities for the infrastructure investments of AOC in the period after 12 December 2000 constitute State aid within the meaning of Article 107(1) TFEU.

8.1.2. **Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011**

State resources and imputability to the state

(196) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ([80]). Local authority resources are subject to the application of Article 107 of the TFEU on state resources ([81]).

(197) In the present case, the contributions to operating losses in favour of Flugplatz Altenburg-Nobitz GmbH are financed out of the budget of public bodies, either its public shareholders ([82]), the *Land* of Thuringia or other public bodies, regional and local authorities. Hence they involve state resources and are also imputable to the state.

Economic advantage

(198) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal market conditions, i.e. in the absence of state intervention ([83]). Only the effect of the measure on the undertaking is relevant, but not the reason for nor the purpose of the state intervention ([84]). Whenever the financial situation of the undertaking is improved as a result of state intervention, an advantage exists.

(199) The Commission further recalls that 'capital placed directly or indirectly at the disposal of an undertaking by the State in circumstances which correspond to normal market conditions cannot be regarded as State aid' ([85]). In the present case, in order to determine whether the public financing of Flugplatz Altenburg-Nobitz GmbH grants the company an advantage that it would not have received under normal market conditions, the Commission has to compare the conduct of the public authorities providing the capital injections with that of an MEO who is guided by prospects of profitability in the long term ([86]).

([79]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.
([80]) Case C-482/99 *France* v *Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.
([81]) Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.
([82]) See footnote 10.
([83]) Case C-39/94 Syndicat français de l'Express international (SFEI) and others v La Poste and others [1996] ECR I-3547, paragraph 60 and Case C-342/96 Kingdom of Spain v Commission of the European Communities [1999] ECR I-2459, paragraph 41.
([84]) Case 173/73 Italian Republic v Commission of the European Communities [1974] ECR 709, paragraph 13.
([85]) Case C-482/99 *France* v *Commission* ('*Stardust Marine*') [2002] ECR I-4397, paragraph 69.
([86]) Case C-305/89 *Italy* v *Commission* ('ALFA *Romeo*') [1991] ECR I-1603, paragraph 23; Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 84.

(200) Germany argues that the effect of the public contributions in question should be measured by taking into account the total economic advantages provided to the region, and that therefore the main shareholder of Flugplatz Altenburg-Nobitz GmbH, Landkreis Altenburger Land, acted as a private investor in normal market conditions. According to Germany, the benefits for Landkreis Altenburger Land were greater than the contributions paid taking into account the benefits for the region. Germany even recognises that the shareholders' contributions could be classed as 'lost subsidies' ([87]) for the airport. However, the potential benefits for the region cannot be taken into consideration when assessing the market economy investor principle. The assessment must disregard any positive repercussions on the economy of the region in which the airport is located, since the Court of Justice has made clear that the relevant question for applying the MEO principle is whether 'in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectorial considerations, would have subscribed the capital in question' ([88]).

(201) In the case at issue, public financing was granted to Flugplatz Altenburg-Nobitz GmbH 'for free', with no interest charged or repayment obligation. Public bodies provided financing to the operator of the airport, without requiring anything in return from this operator, thus relieving it of the burden of financing itself through bank loans or equity funds.

(202) The annual capital injections by the shareholders served to cover Flugplatz Altenburg-Nobitz GmbH's annual losses. Ultimately therefore, the annual capital injections served to cover part of the normal operating expenses of the airport, thereby relieving the undertaking of an economic burden it would normally have to bear. Germany has not explained why an MEO would continue injecting capital into an undertaking that constantly generated losses, without requiring anything in return.

(203) In view of the above, the Commission considers that an MEO would not have taken the decision to cover the increasing losses of Flugplatz Altenburg-Nobitz GmbH year after year. Therefore, the contributions to operating losses from the German regional authorities and public bodies relieved Flugplatz Altenburg-Nobitz GmbH of the burden of covering all of its own operating losses and conferred an economic advantage on Flugplatz Altenburg-Nobitz GmbH, which it would not have obtained under normal market conditions.

Selectivity

(204) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the contributions to operating losses were paid only to Flugplatz Altenburg-Nobitz GmbH. Thus, those contributions are selective measures within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(205) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as being affected by that aid. In accordance with settled case-law ([89]), for a measure to distort competition it is sufficient that the recipient of the aid is in competition with other undertakings in markets open to competition.

(206) As set out above, the operation of an airport constitutes an economic activity and airports compete to attract passengers and airlines. Therefore, Flugplatz Altenburg-Nobitz GmbH is in competition with other undertakings on a market open to competition. The economic advantage received by the company strengthens its position vis-à-vis its competitors in the European market for airport service providers.

(207) Therefore, the public funding under examination distorts or threatens to distort competition and affects trade between the Member States.

Conclusion

(208) For the reasons set out above, the Commission concludes that the contributions by the German regional authorities and public bodies towards operating losses of Flugplatz Altenburg-Nobitz GmbH granted after 12 December 2000 constitute State aid within the meaning of Article 107(1) TFEU.

([87]) *'verlorene Zuschüsse'* — see communication from Germany, 30.3.2012.
([88]) Case 40/85 *Belgium* v *Commission* [1986] ECR I-2321.
([89]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.

8.1.3. **Measure 3: Airport charges and payments to Ryanair under the airport services and marketing agreements**

(209) The Commission excludes from the scope of its analysis the last marketing agreement signed with AMS on 21 September 2010, the 'side letter', because its financing was granted by private regional companies which had made a commitment to maintain Ryanair activities at the airport ([90]).

Concept of undertaking and economic activity

(210) In accordance with Article 107(1) TFEU, State aid rules apply only if the recipient is an 'undertaking'. The Court of Justice of the European Union has consistently defined undertaking as any entity engaged in an economic activity, regardless of its legal status or ownership or how it is financed ([91]). Any activity consisting in supplying goods and services in a market is an economic activity ([92]).

(211) Ryanair offers scheduled passenger air transport services in the market. It clearly carries on an economic activity.

(212) AMS is a wholly owned subsidiary of Ryanair. Consequently, Ryanair can be presumed to have exercised decisive influence over the behaviour of AMS. Moreover, the 2008 and 2010 marketing agreements were signed on behalf of AMS by Mr Eddie Wilson, who at the time was a Director of AMS and concurrently a Director of Ryanair ([93]). The marketing agreements in question state in their preamble that 'AMS has exclusive licence to offer marketing services on the travel website www.ryanair.com, the website of the Irish low fares airline Ryanair'. For the purpose of the application of State aid rules, AMS and Ryanair are therefore considered to be a single undertaking within the meaning of Article 107(1) TFEU.

State resources

(213) The concept of State aid applies to any advantage granted through state resources by the state itself or by any intermediary body acting by virtue of powers conferred on it ([94]). Local authority resources are subject to the application of Article 107 of the TFEU on state resources ([95]).

(214) In the case at hand, at all material times the state has exercised indirect or direct control over the resources under consideration. Since the moment Flugplatz Altenburg-Nobitz GmbH started doing business with Ryanair, the company has been owned by a majority of public shareholders. Currently, it is fully owned by public shareholders: all shareholders are either public authorities or fully publicly owned and the company itself holds 32 % of its shares.

(215) Thus, the Commission considers that all resources of Flugplatz Altenburg-Nobitz GmbH must be considered state resources.

Imputability to the State

(216) The Court of Justice has ruled that, even if the state is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the state. Therefore, the mere fact that a public undertaking is under state control is not sufficient for measures taken by that undertaking, such as the agreement of 3 March 2003 concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair and the subsequent marketing agreements, to be considered imputable to the State ([96]).

([90]) See recital 105.
([91]) See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4) part 2.1 and associated case-law, in particular Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451.
([92]) Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75.
([93]) See http://corporate.ryanair.com/investors/biographies/ accessed on 23 June 2014.
([94]) Case C-482/99 *France v Commission* (hereinafter: '*Stardust Marine*') [2002] ECR I-4397.
([95]) Judgment of 12 May 2011 in Joined Cases T-267/08 and T-279/08 *Nord-Pas-de-Calais*, not yet published, paragraph 108.
([96]) *Stardust Marine* judgment, paragraphs 52 and 57.

(217) According to the Court of Justice, indicators from which imputability can be inferred, are ([97]):

(a) the fact that the undertaking in question could not take the contested decision without taking account of the requirements of the public authorities;

(b) the fact that the undertaking had to take account of directives issued by public authorities;

(c) the integration of the public undertaking into the structures of public administration;

(d) the nature of the public undertaking's activities and the exercise of these activities in the market in normal conditions of competition with private operators;

(e) the legal status of the undertaking;

(f) the intensity of the supervision exercised by the public authorities over the management of the undertaking;

(g) any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains.

(218) Germany argues that the Ministry of Construction and Transport of the *Land* of Thuringia had no right to influence the conclusion of the contracts with Ryanair/AMS. According to Germany, the relevant ministry and the government of the *Land* of Thuringia were only involved in the decision-process regarding the infrastructure investments in the airport. Germany rejects the Commission's arguments as to the supervisory role of the Ministry of Construction and Transport of the *Land* of Thuringia and therefore the presumed imputability to the State of the measure in question.

(219) Germany also rejects the Commission's argument according to which the setting of airport fees must, under German aviation law §43a LuftVZO, receive prior approval by the supervisory authority before they can be put into effect. According to Germany, even without the approval of the supervisory authority, the setting of airport fees could be adopted by Flugplatz Altenburg-Nobitz GmbH, since the supervisory authority only has to check that the fees do not exceed a certain level.

(220) In August 2010, the Gera Chamber of Commerce, a public body, campaigned in favour of the continuation of the low-cost concept at AOC and urged the government of the *Land* of Thuringia to negotiate with Ryanair on destinations and marketing measures ([98]). According to Germany, this argument supports the market economy investor analysis, according to which maintaining and supporting Ryanair routes was economically justified.

(221) However, the Commission considers that the competent ministries of the *Land* of Thuringia were involved in the conclusion of the Ryanair contracts. Before Flugplatz Altenburg-Nobitz GmbH concluded the contract on airport services with Ryanair, the competent ministries of the *Land* of Thuringia apparently took part in the negotiations. A press article states that negotiations took longer because the ministries of the *Land* of Thuringia tried to block the deal ([99]). At the same time, the Minister for the Economy of the *Land* of Thuringia, Schuster, claimed that the *Land* was in a position to approve the necessary measures. He is quoted as saying that if Ryanair needed an

([97]) Ibid.

([98]) http://www.altenburg-tourismus.de/reiseveranstalter/pressemitteilungen.htm Osterländer Volkszeitung of 24 August 2010, p. 13: 'Er forderte deshalb die Landesregierung auf, umgehend mit Ryanair über den Aufbau von drei bis fünf Linienverbindungen zu verhandeln und parallel in den Zielländern die Tourismus-Werbung aufzubauen'.

([99]) Dresdner Neue Nachrichten of 5.3.2003: 'Der Regionalflughafen Altenburg-Nobitz war in den vergangenen Jahren mit mehreren Millionen Euro Fördermitteln modernisiert worden und hatte sich immer wieder um die Ansiedlung eines Billig-Fliegers bemüht. Die Verhandlungen mit Ryanair waren über viele Monate geführt worden. Als letztes Hindernis erwies sich der hinhaltende Widerstand Erfurter Ministerien, die diese Ansiedlung zu blockieren versuchten.'

extended runway, the extension would be granted. The article also explains that the start of Ryanair at AOC could reduce passenger numbers at Dresden and Leipzig-Halle airport ([100]).

(222) The Ministry of Building and Transport of the *Land* of Thuringia is the supervisory authority of Flugplatz Altenburg-Nobitz GmbH. In addition, under German aviation law, §43 LuftVZO, the setting of airport fees must receive prior approval by the supervisory authority before they can be put into effect. Moreover, the AOC Schedule of Charges of 18 September 2006 provides for signature by a representative of the Ministry of Building and Transport.

(223) The involvement of the ministries at political level can be seen from the discussion in the Parliament of the *Land* of Thuringia. Not only technical questions but also the overall economic viability of the airport were discussed, as recorded in the detailed minutes of the discussion ([101]).

(224) The marketing agreements with Ryanair were also discussed at the level of the district council ('*Kreistag*'). A press article states that the *Kreistag* approved the payment of EUR 670 000 for marketing measures regarding the setting-up of a new flight connection by Ryanair ([102]). The head of the district ('*Landrat*') is quoted as saying that without the marketing payments the scheduled services would have been stopped.

(225) Finally, the Commission notes that the involvement of Gera Chamber of Commerce — a public and self-administering body incorporated under public law — in the conclusion of Ryanair's agreements confirms the exercise of public influence over the decision-making process regarding those contracts.

(226) To conclude, looking at the supervision by the Ministry of Construction and Transport of the *Land* of Thuringia, the involvement of the ministries at political level, the various discussions which took place in the Parliament of the *Land* of Thuringia and the involvement of public entities, it appears that public bodies were in a position to control the activities of Flugplatz Altenburg-Nobitz GmbH, and that they were involved in important decisions concerning the economic exploitation of the airport. In particular, when business at the airport was beset by problems, public authorities were involved in discussions about the future of the airport. Controversial discussions took place at the political level in the *Land* of Thuringia, and the change of government at *Land* level contributed to the decision to convert the airport in 2010 and to discontinue low-cost traffic at the airport ([103]).

(227) Therefore, the Commission takes the view that the decision concerning the implementation of the agreement of 3 March 2003 and the marketing agreement of 7 April 2003 concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Airport Marketing Services thereafter are imputable to public authorities.

([100]) http://www.radio-lotte.de/nachricht/14036 'Thüringen will mit Millioneninvestitionen die irische Billigfluglinie Ryanair an den Flughafen Altenburg-Nobitz lotsen. Nach Aussagen der "Leipziger Volkszeitung" stehen dafür rund 28 Millionen Euro aus einem Infrastruktur-Sonderprogramm zur Verfügung. Thüringens Wirtschaftsminister Schuster sagte, man sei auch flexibel genug, erforderliche Maßnahmen bereits in diesem Jahr zu bewilligen. Wenn Ryanair beispielsweise eine längere Start- und Landebahn benötige, dann werde diese Verlängerung erfolgen. Sollte Ryanair sich für Altenburg-Nobitz entscheiden, würde Dresden und Leipzig/Halle ein weiterer Passagierverlust drohen. Der einstige Militärflugplatz liegt geografisch in der Mitte. Der Dresdner Flughafen hat in diesem Jahr bislang rund 15 Minus gemacht, Leipzig/Halle rund zwölf Prozent'.

([101]) Thüringer Landtag, 4th term, plenary minutes 4/11, 28 January 2005, 11th Session, Friday, 28 January 2005, Prospects for Flughafen Altenburg-Nobitz, p. 1097.

([102]) http://www.neues-deutschland.de/artikel/161087.ein-flughafen-an-jeder-muelltonne.html 'Zuvor hatte der Kreistag beschlossen, dem irischen Billigflieger Ryanair für die Einrichtung einer zusätzlichen Flugverbindung 670 000 Euro Marketingzuschüsse zu Gewähren. "Ohne diese Beschlussfassung wäre der Linienflugbetrieb faktisch am Ende gewesen und der Flugplatz hätte seine Bedeutung zwangsläufig verloren", rechtfertigte der Landrat und Aufsichtsratsvorsitzende der Betreibergesellschaft Flugplatz Altenburg-Nobitz GmbH die Finanzspritze. Zu den bisherigen Verbindungen von und nach Stansted (London), Edinburgh (Schottland) und Girona (Barcelona) soll ab März 2010 zweimal in der Woche eine Verbindung nach Alicante hinzu kommen.'

([103]) See recital 32(d).

Economic advantage

(228) In order to determine whether the airport services and marketing agreements granted Ryanair/AMS an advantage, the Commission has to examine whether in similar circumstances an airport operating under normal conditions of the market economy and guided by prospects of profitability in the longer term would have entered into the same or similar commercial arrangement as Flugplatz Altenburg-Nobitz GmbH. The existence of an advantage can normally be excluded if: (a) the price charged for the airport services corresponds to the market price; or (b) if it can be demonstrated through an *ex ante* analysis that the agreements with the airline incrementally contribute to the profitability of the airport and are part of an overall strategy leading to profitability in the long term.

(229) According to the *Charleroi* judgment ([104]), when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of the agreements on AOC taking into account all relevant features of the measures in question.

(230) The Court declared in the *Stardust Marine* judgment that, '… in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation' ([105]).

(231) In order to be able to apply the market economy operator test, the Commission has to take itself back to the time when the agreements between AOC and Ryanair/AMS were concluded (i.e. 2003 for the airport services and first marketing agreement, 2008 for the second marketing agreement and 2010 for the third one). The Commission must also base its assessment on the information and assumptions which were available to the airport when the agreements were signed.

Market price analysis

(232) The Commission has to determine whether the price conditions applied to Ryanair/AMS by Flugplatz Altenburg-Nobitz GmbH correspond to the market price. In this regard, Germany argues that the airport services agreement signed between AOC and Ryanair on 3 March 2003 was market-compliant and that the airport fees applicable to Ryanair were in line with those stipulated in the schedule of airport charges described at Section 3.4.1. The schedules are applicable to all potential airlines flying to/from the airport. The fact that Ryanair was the only airline active at Altenburg-Nobitz airport in the 2003-2011 period is irrelevant according to Germany.

(233) Germany is of the opinion that the marketing services agreements concluded with Ryanair and AMS have to be considered separately. However, the Commission notes that AMS is a wholly owned subsidiary of Ryanair; therefore the Commission considers that both types of agreements with Ryanair and AMS have to be considered together. Secondly, regarding possible separate consideration of the Ryanair airport services agreement and the marketing agreement of 7 April 2003, the marketing agreement itself mentions that the success fee is to be deducted from the airport services fees to arrive at the net charge to be paid by Ryanair. The agreement itself opts for a net result of the airport services fees to be paid by Ryanair on the one hand and the marketing fees to be paid by the airport on the other.

(234) In any case, the Commission has to consider the overall price paid by the airline in order to determine whether it paid the market price. Indeed, Ryanair paid airport fees to Flugplatz Altenburg-Nobitz GmbH during the years 2003-2011 when it served AOC, and received payments for marketing services from the airport. As mentioned in recital 49, the German authorities state that AOC collects from Ryanair a fixed landing fee of […]* per aircraft and a passenger fee of […]* per passenger. An extra handling fee does not seem to apply since the fees paid by Ryanair also include handling ([106]). However, these fees are reduced by the marketing 'success fee', so in the end Ryanair only pays the airport a fixed fee of […]* ([107]) per departing passenger. Ryanair thus receives a discount from the official fees as they are set out in the AOC schedule of charges and described in Section 3.4.1.

([104]) Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 59 ('*Charleroi* judgment').
([105]) Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 71 ('*Stardust Marine* judgment').
([106]) See recital 52.
([107]) For the first 5 years and fewer than four rotations — see Table 12.

(235) In order to establish whether the price charged by an airport to an airline corresponds to the market price, an appropriate benchmark has to be identified. Nevertheless the Commission has strong doubts as to whether an appropriate benchmark can be identified in this case to establish the true market price for the services provided by Ryanair/AMS. In any event, the Commission considers that a benchmarking exercise should be based on a comparison of airport charges, net of any benefits provided to the airline (such as marketing support, discounts or any other incentive), across a sufficient number of suitable 'comparator airports', whose managers behave as market economy operators. In view of the difficulty in this case of finding comparator airports, the Commission considers an *ex ante* incremental profitability analysis to be the most relevant criterion for the assessment of the agreements between AOC and Ryanair/AMS.

Ex ante *analysis to demonstrate the profitability of the airport*

(236) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the market economy investor test if they contribute incrementally, from an *ex ante* standpoint, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, for the duration of the arrangement and with a reasonable profit margin ([108]) on the basis of sound medium-term prospects ([109]).

(237) The Commission will therefore take into account all expected costs incurred incrementally by the airport in relation to the airline's activity at the airport ([110]). Such incremental costs may include all types of expenses or investments, such as incremental personnel, equipment and investment costs arising from the presence of the airline at the airport. For instance, if the airport needs to expand or build a new terminal or other facilities mainly to accommodate the needs of a specific airline, such costs should be taken into consideration when calculating the incremental costs.

(238) The Commission will base its *ex ante* incremental analysis on the original time schedule planned in the contract, even though the contract actually ceased before the deadline initially planned.

(239) The Commission will consider three incremental analyses to assess the profitability of all four agreements concluded between the airport and Ryanair/AMS:

(a) An incremental analysis of the airport services agreement and the marketing services agreement, both concluded in 2003 for a ten-year period.

(b) An incremental analysis for joint consideration of the 2003 airport services agreement, the 2003 marketing services agreement and the 2008 marketing services agreement: the 2008 marketing agreement concluded with AMS introduced fixed payments for marketing services while the 2003 marketing services agreement concluded with Ryanair was still in force.

(c) An incremental analysis for joint consideration of the 2003 airport services agreement, the 2003 marketing services agreement and the 2010 marketing services agreement: the 2010 marketing agreement concluded with AMS replaced the 2008 contract and introduced one fixed payment for marketing services; the 2003 marketing services agreement concluded with Ryanair was still in force.

— Airport services and marketing agreements of 2003

(240) The Commission will first examine whether the Ryanair airport services agreement of 3 March 2003 and the first marketing agreement signed with Ryanair on 7 April 2003 contribute incrementally to the profitability of the airport. It will do this by means of an *ex ante* analysis, which will cover the 2003-2013 period, as both agreements were to run for 10 years.

([108]) A reasonable profit margin is a 'normal' rate of return on capital, that is to say, a rate of return that a typical company would require for an investment of similar risk. The return is measured as an Internal Rate of Return ('IRR') for the anticipated cash flows arising from the arrangement with the airline.
([109]) This does not preclude foreseeing that future benefits over the duration of the arrangements may offset initial losses.
([110]) *Charleroi* judgment, paragraph 59.

(241) In order to assess the contribution of both of Ryanair's agreements to the profitability of the airport, the Commission will establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH would have been able to expect with the information at its disposal when it started to do business with Ryanair in 2003. The Commission will base its assessment on the data provided by Germany in the table drafted by the airport and presented at the shareholders' meeting of 22 April 2003, showing that doing business with Ryanair would bring in additional annual income of […]* ([111]).

(242) Incremental costs include:

(a) costs for marketing services,

(b) investment costs directly linked to the Ryanair agreements,

(c) incremental operational costs directly caused by the Ryanair agreements.

(243) The costs for marketing services are, as stipulated in the 2003 marketing agreement, reflected in the net charge to be paid by Ryanair per departing passenger.

(244) Regarding incremental investments costs, the Commission notes that the extension of the runway was an obligation of AOC under the agreement between the airport and Ryanair. Although Germany states that the runway was not extended to the extent required in the Ryanair agreement, the extension is confirmed by the annual financial reports of Flugplatz Altenburg-Nobitz GmbH for the years 2003 and 2004. These state that in the context of the Ryanair services agreement, it became necessary to extend the runway in order that Ryanair might operate at the airport. Therefore the Commission will include the extension of the runway in 2003 and 2004. As Germany produced no *ex ante* forecast of the cost involved, the Commission will consider the effective overall amount of EUR 687 882 ([112]) paid for both extensions, the first of which was completed in 2003 and the second in 2004 ([113]). According to Germany, the runway was not extended as far as required by Ryanair, but to a lesser extent. This assumption is favourable to Ryanair.

(245) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 provided by Germany in its table from 22 April 2003, which amounts to EUR 145 650 per year. This amount will be updated per year in line with inflation (2 % per year).

(246) With regard to the incremental revenues expected from this new activity with Ryanair, the Commission will take into account the following revenues:

(a) Aeronautical revenues: revenues expected per departing passenger from Ryanair's activity should amount to […]* in the first five years and […]* in the last five years. These amounts are stipulated in the marketing agreement of 7 April 2003 as the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations ([114]). The Commission will consider a weighted average fee of […]* for the year 2008 ([115]).

(b) Non-aeronautical revenues: Germany has not provided any information regarding provisional *ex ante* data on non-aeronautical revenues ([116]). The Commission notes that the airport did not take into account any non-aeronautical revenue per passenger in its forecasts of 22 April 2003. Germany provided the Commission with *ex post* data on non-aeronautical revenues during the 2006-2011 period, as set out in Table 16. In the absence of any relevant *ex ante* information, exceptionally the Commission will base its analysis on the average of the data provided by Germany, which amounts to EUR 1,50-2,00 […]* per passenger. As this average is calculated over the 2006-2011 period, the Commission will consider it as a reference value for 2009. A 2 % inflation rate will then be applied to this average. These EUR 1,50-2,00 […]* non-aeronautical revenues relate to both departing and landing passengers.

([111]) See recital 99.
([112]) See Table 3 at recital 38.
([113]) As the Commission has not received the breakdown between 2003 and 2004, it will assume that half of the own resources contribution (EUR 187 882) was paid per year.
([114]) In 2003, a single rotation between London Stansted and Altenburg was agreed.
([115]) The agreement plans […]* for the first five years, with the expiry date of 30 April 2008. After that, the fee becomes […]* for the period 1 May 2008-30 April 2013. A weighted average gives […]* for the whole year of 2008.
([116]) Despite several requests from the Commission, Germany has not provided any data regarding *ex ante* non-aeronautical revenues and refers to Table 13 — see recital 99.

Table 16

***Ex post* non-aeronautical revenues** ([1])

(in EUR)

	2006	2007	2008	2009	2010	2011
Non-aeronautical revenues	30 000-40 000 […]*	80 000-90 000 […]*	280 000-290 000 […]*	290 000-300 000 […]*	330 000-40 000 […]*	25 000-30 000 […]*
Number of passengers	105 213	147 100	138 400	140 800	119 000	15 000
Non-aeronautical revenues per passenger	0,10-0,50 […]*	0,30-0,80 […]*	1,80-2,20 […]*	2,00-2,20 […]*	2,50-3,00 […]*	1,50-2,00 […]*

([1]) Data provided by Germany. The number of passengers corresponds to data in Table 1.

(247) The Commission will assume a number of passengers according to what Flugplatz Altenburg-Nobitz GmbH should have expected in 2003. In 2003, one daily flight was agreed from Altenburg-Nobitz to London. Taking into account an 80 % capacity load factor, which is a more optimistic approach than the one used by the airport in its projections from April 2003 (70 %), daily passengers amount to 118 ([117]), which gives an annual additional number of passengers linked to Ryanair of 43 216 ([118]).

(248) Germany did not provide any discount rate or weighted average capital costs for the airport. The Commission will therefore, on the basis of its 2008 communication on reference rates ([119]) which states a reference rate of 4,80 % for Germany, take a 4,8 % discount rate into account for the period 1 January 2003 to 31 July 2003.

(249) Table 17 shows the resulting incremental business plan, incorporating all the assumptions described. Such a plan should have been considered by Flugplatz Altenburg-Nobitz GmbH before starting to do business with Ryanair, in order to ascertain that agreements with Ryanair incrementally contribute to the airport's profitability. The net present value (hereinafter 'NPV') of the cash flows is positive. This proves that the Ryanair services agreement in conjunction with the first marketing agreement of 2003 would have been profitable for the airport from an *ex ante* perspective.

([117]) Germany reports a flight capacity of 148 passengers in its table from 22 April 2003.
([118]) The Commission will base all calculations on a standard number of 365 days per year.
([119]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6.) — Associated table on reference/discount rates and recovery rates for the 15 EU Member States (from 1.8.1997 to 1.5.2004).

Table 17

Ex ante business plan for both the airport services and marketing agreements of 2003

Year	1.5.2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	30.4.2013
Annual number of departing passengers	28 811	43 216	43 216	43 216	43 216	43 216	43 216	43 216	43 216	43 216	14 405
EXPECTED REVENUES *(in EUR)*											
Net charge to be paid by Ryanair per departing passenger	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
Total aviation revenues	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
Non-aeronautical revenues per passenger	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
Total non-aeronautical revenues	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
Total annual revenues	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*	[…]*
EXPECTED CHARGES *(in EUR)*											
Monthly operational charges	12 138	12 381	12 628	12 881	13 139	13 401	13 669	13 943	14 222	14 506	14 796
Annual operational charges	97 104	148 569	151 541	154 571	157 663	160 816	164 032	167 313	170 659	174 072	59 185
Investment costs: Extension of the runway	408 491	279 391	0	0	0	0	0	0	0	0	0
Total annual charges	505 595	427 960	151 541	154 571	157 663	160 816	164 032	167 313	170 659	174 072	59 185
NET ANNUAL RESULT *(in EUR)*	– 302 213	– 120 415	158 525	158 065	157 596	165 761	169 595	169 098	168 590	168 073	55 848

Discount rate	4,8 %	**NPV *(in EUR)***	**637 143**

— Airport services and marketing agreements of 2003 + The marketing agreement of 28 August 2008

(250) The Commission will examine by means of an *ex ante* analysis whether the marketing agreement concluded with AMS on 28 August 2008, together with the airport services agreement and the marketing agreement of 2003, incrementally contributes to the profitability of the airport. The Commission will thus establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH would have been able to expect from this new agreement with the information at its disposal in 2008. As the duration of the 2008 contract was two years, this analysis will be carried out in respect of two years ([120]).

(251) Incremental costs include:

(a) costs for marketing services;

(b) operational incremental costs directly caused by the Ryanair agreements.

(252) The costs for marketing services are, according to the 2003 marketing agreement, reflected in the net charge of […]* to be paid by Ryanair per departing passenger ([121]). In addition, the second marketing agreement of 2008 introduced a fixed amount of EUR […]* for 2008 and EUR […]* for 2009 to be paid by the airport to AMS.

(253) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 initially provided by Germany in its table from April 2003, which becomes EUR 13 401 in 2008 taking into account a 2 % annual inflation rate. This amount will be further updated each year according to inflation (2 % per year).

(254) To assess incremental revenues, the Commission will take into account the following revenues:

(a) Aeronautical revenues: revenues expected per departing passenger from Ryanair's activity should amount to […]* for the period in question, according to the marketing agreement of 7 April 2003, representing the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations ([122]).

(b) Non-aeronautical revenues: as explained in recital 246(b), in the absence of any relevant *ex ante* information, the Commission will exceptionally rely on *ex post* data, and the average of EUR 1,50-2,00 […]* seems appropriate for 2009. This figure will be corrected on the basis of a 2 % inflation rate. These non-aeronautical revenues will apply to both departing and landing passengers.

(255) The Commission will assume a number of passengers on the basis of the number Flugplatz Altenburg-Nobitz GmbH should have expected in 2008. The 2008 marketing services agreement mentions among its objects routes between AOC and London with a four-per-week winter service and a daily summer service, and a connection to Girona with a three-per-week summer-only service ([123]). Considering an 80 % load factor on an aircraft with 189 seats ([124]), the Commission calculates an expected annual number of 45 333 passengers for the flights to London and 13 797 passengers for the flights to Girona.

(256) Germany did not provide any discount rate or weighted average capital cost for the airport. The Commission will thus consider a 5,59 % discount rate, based on its 2008 communication on reference rates ([125]), which gives a base rate of 4,59 % for Germany for the period 1 July 2008 to 31 August 2008, to which 100 basis points have to be added.

([120]) Another option would have been to conduct the analysis over the 28 August 2008-27 August 2010 time-frame, the actual duration of the contract: as all the assumptions remain equal, the Commission chooses to perform the analysis on two years without further specifications. This simplifies the analysis and provides the same result.

([121]) On the date of signature of the second marketing agreement (28 August 2008), the net charge per departing passenger to be paid by Ryanair to AOC was EUR […]*, as the number of rotations was no more than four.

([122]) In 2003, a single rotation between London Stansted and Altenburg was agreed.

([123]) As indicated in footnote 48, the IATA summer season covers a seven-month period and the winter one five months.

([124]) Flight capacity mentioned in the 2008 marketing agreement.

([125]) Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6.) — Associated table on base rates for the 27 Member States (from 1.7.2008 to 30.6.2013).

(257) Table 18 shows the resulting incremental business plan, including all the assumptions described. Such a plan should have been taken into consideration by Flugplatz Altenburg-Nobitz GmbH before signing its marketing agreement with AMS in 2008 in order to ascertain that this agreement incrementally contributed to the profitability of the airport. The net present value of the cash flows is positive. This proves that this second marketing agreement, combined with the airport services agreement and the marketing agreement of 2003, would have been profitable to the airport from an *ex ante* perspective.

Table 18

Ex ante business plan for the airport services and marketing agreements of 2003 + the marketing agreement of 28 August 2008

	Year 1	Year 2
Annual number of departing passengers	59 130	59 130
EXPECTED REVENUES *(in EUR)*		
Net charge to be paid by Ryanair per departing passenger	[…]*	[…]*
Total aviation revenues	[…]*	[…]*
Non-aeronautical revenues per passenger	[…]*	[…]*
Total non-aeronautical revenues	[…]*	[…]*
Total annual revenues	[…]*	[…]*
EXPECTED CHARGES *(in EUR)*		
Fixed marketing charges	[…]*	[…]*
Monthly operational charges	13 401	13 669
Annual operational charges	160 812	164 028
Total annual charges	[…]*	[…]*
NET ANNUAL RESULT *(in EUR)*	141 938	42 455
Discount rate	5,59 %	
Net Present Value *(in EUR)*	**182 146**	

— Airport services and marketing agreements of 2003 + the marketing agreement of 25 January 2010

(258) The Commission will examine by means of an *ex ante* analysis whether the marketing agreement concluded with AMS on 25 January 2010, together with the airport services agreement and the marketing agreement of 2003, incrementally contributes to the profitability of the airport. The Commission will thus establish incremental costs and revenues, which Flugplatz Altenburg-Nobitz GmbH could have expected from this new agreement with the information at its disposal in 2010.

(259) The duration of the 2010 contract is over one year (it starts on 25 January 2010 and ends one year after the start of the first flight connection, supposed to start with the 2010 summer season). However, the services provided by Ryanair cover a period of seven months (IATA summer season). Therefore, the Commission will conduct its incremental analysis based on a seven-month period.

(260) Incremental costs include:

(a) costs for marketing services;

(b) incremental operational costs directly caused by the Ryanair agreements.

(261) The costs for marketing services are reflected, in line with the 2003 marketing agreement, in the net charge of […]* to be paid by Ryanair per departing passenger ([126]). In addition, the third marketing agreement of 2010 introduced a fixed amount of EUR […]* for 2010 to be paid by the airport to AMS.

(262) Regarding the incremental operational costs directly linked to Ryanair, the Commission will consider the monthly amount of EUR 12 137,50 initially provided by Germany in its table from April 2003, which becomes EUR 13 942 in 2010 taking into account a 2 % annual inflation rate.

(263) To assess incremental revenues, the Commission will take into account the following revenues:

(a) Aeronautical revenues: revenues expected from Ryanair's activity per departing passenger should amount to […]* for the period in question, according to the marketing agreement of 7 April 2003, representing the net charge per departing passenger including all charges to be paid by Ryanair to AOC for one to four rotations ([127]).

(b) Non-aeronautical revenues: as explained in recital 246(b), in the absence of any relevant *ex ante* information, the Commission will exceptionally base its analysis on the *ex post* data provided by Germany in Table 16. The Commission will assume that, in January 2010 when the third marketing agreement was signed, the airport, in determining likely non-aeronautical revenues, would have taken into account its actual revenues in the preceding years, which had significantly increased in comparison with 2006 and 2007. Consequently, it seems likely that in 2010 the airport would have based its forecasts in terms of non-aeronautical revenues on the two preceding years, which would give an average of EUR 1,80–2,30 […]* per passenger for 2008 and 2009. These non-aeronautical revenues apply to both departing and landing passengers.

(264) The Commission will assume a number of passengers on the basis of the number Flugplatz Altenburg-Nobitz GmbH should have expected from the signature of the 2010 marketing services agreement. The agreement mentions among its objects summer routes between AOC and London on a daily basis commencing in summer 2010, with Girona three times a week and Alicante twice a week. Considering an 80 % load factor for an aircraft with 189 seats ([128]), the Commission calculates the number of passengers for this seven-month flight period as being 32 193 for flights to London, 13 797 for flights to Barcelona, and 9 198 for flights to Alicante.

(265) Table 19 shows the resulting incremental business plan, including all the assumptions described, which should have been taken into consideration by Flugplatz Altenburg-Nobitz GmbH before signing its marketing agreement with AMS in 2010, to ascertain that this agreement incrementally contributed to the airport's profitability. The cash flow in the period is negative. This proves that this third marketing agreement, combined with the airport services agreement and the marketing agreement of 2003, was not profitable to the airport from an *ex ante* perspective.

([126]) On the date of signature of the third marketing agreement (25 January 2010), the net charge per departing passenger to be paid by Ryanair to AOC was […]*, as the number of rotations was not above four.
([127]) In 2003, a single rotation between London Stansted and Altenburg was agreed.
([128]) Flight capacity mentioned in the 2010 marketing agreement.

Table 19

***Ex ante* business plan for the airport services and marketing agreements of 2003 + the marketing agreement of 25 January 2010**

	2010 summer season
Number of departing passengers	55 188
EXPECTED REVENUES *(in EUR)*	
Net charge to be paid by Ryanair per departing passenger	[…]*
Total aviation revenues	[…]*
Non-aeronautical revenues per passenger	[…]*
Total non-aeronautical revenues	[…]*
Total revenues	[…]*
EXPECTED CHARGES *(in EUR)*	
Fixed marketing charges	[…]*
Monthly operational charges	13 943
Total operational charges	97 601
Total charges	[…]*
NET RESULT *(in EUR)*	**– 318 569**

(266) Consequently, in 2010 the airport paid Ryanair/AMS EUR […]* for seven months of flight services which provided it with […]* aeronautical revenues and EUR […]* non-aeronautical revenues. At this time and since 2003, the date on which it started to do business with Ryanair, the airport had never been profitable, even at an operational level without public contributions.

— Conclusion

(267) In conclusion, the Commission considers on the one hand that the conditions offered to Ryanair/AMS under the combination of the airport services agreement concluded on 3 March 2003 and the marketing agreements concluded on 7 April 2003 and on 28 August 2008 between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS are market compliant. Therefore the Commission takes the view that Ryanair/AMS did not benefit from a selective economic advantage through this combination of agreements.

(268) On the other hand, the Commission considers that the conditions offered to Ryanair/AMS under the combination of the airport services agreement concluded on 3 March 2003 and the marketing agreements concluded on 7 April 2003 and on 25 January 2010 between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS are not market-compliant. Therefore the Commission takes the view that Ryanair/AMS benefited from a selective economic advantage through this combination of agreements.

Selectivity

(269) Article 107(1) TFEU requires that in order to be defined as State aid a measure must favour 'certain undertakings or the production of certain goods'. The Commission notes that the airport services and marketing agreements were concluded only with Ryanair and its wholly owned marketing services subsidiary AMS.

(270) Although other airlines (Eurowings and Air Berlin) flew from Altenburg in the 2000-2002 period, they did not benefit from such marketing agreements. Germany argues that the conditions of Ryanair's service agreement were drafted according to the schedule of airport charges in force at the time and applicable to all potential airlines. However, the Commission is of the opinion that it is the combination of this specific services agreement with the subsequent marketing agreements which provided an advantage to Ryanair. Thus, all these agreements constitute selective measures within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(271) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, it is to be assumed that the latter have been affected by that aid ([129]). In accordance with settled case-law ([130]), for a measure to distort competition it is sufficient that the recipient of the aid is in competition with other undertakings in markets open to competition.

(272) The service and marketing agreements in question contribute to significantly reducing the airport charges to be paid by Ryanair, which lowers the normal operating costs of an airline benefiting from such a reduction. Therefore, this airline is capable of strengthening its position in the market. Moreover, the air transport sector is characterised by intense competition between operators from different Member States, in particular since the entry into force of the third stage of liberalisation of air transport ('third package') on 1 January 1993 ([131]). It follows that the reduced charges affect trade between Member States and distort or threaten to distort competition in the air transport sector.

(273) Therefore, the service and marketing agreements concluded with Ryanair distort or threaten to distort competition and affect trade between Member States.

Conclusion

(274) The Commission concludes that the airport services agreement concluded on 3 March 2003, combined with the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS on 7 April 2003 and on 28 August 2008 — granted after the judgment in *Aéroports de Paris* — does not constitute State aid to Ryanair/AMS within the meaning of Article 107(1) TFEU.

(275) The Commission concludes that the airport services agreement concluded on 3 March 2003, combined with the marketing agreements concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair/AMS on 7 April 2003 and 25 January 2010 — granted after the judgment in *Aéroports de Paris* — constitutes State aid to Ryanair/AMS within the meaning of Article 107(1) TFEU.

8.2. COMPATIBILITY OF THE AID

8.2.1. **Measure 1: Financing of airport infrastructure at AOC**

(276) The Commission has to assess whether the aid can be found compatible with the internal market. Article 107(3) TFEU provides for certain exemptions to the general rule set out in Article 107(1) TFEU that State aid is not

([129]) Case 730/79 *Philip Morris* [1980] ECR I-2671, paragraph 11.
([130]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 46.
([131]) See Council Regulations (EEC) No 2407/92 (OJ L 240, 28.8.1992, p. 1), (EEC) No 2408/92 (OJ L 240, 28.8.1992, p. 8) and (EEC) No 2409/92 (OJ L 240, 28.8.1992, p. 15).

compatible with the internal market. The aid in question can only be assessed on the basis of Article 107(3)(c) TFEU, which stipulates that: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest', may be considered to be compatible with the internal market.

(277) In this regard, the 2014 Aviation Guidelines provide a framework for assessing whether aid to airports may be declared compatible pursuant to Article 107(3)(c) TFEU. As provided for in recital 173 of the 2014 Aviation Guidelines, the Commission will apply the rules in force at the time when the aid was granted to unlawful investment aid to airports. Accordingly, it will not apply the principles set out in the 2014 guidelines in the case of unlawful investment aid to airports granted before 4 April 2014, the date of adoption of these guidelines.

(278) The financing of AOC's infrastructure was granted between 2000 and 2011. Therefore, the principles set out in the 2005 Aviation Guidelines apply for the assessment of the compatibility of the infrastructure financing granted between 2005 and 2011. As regards infrastructure financing granted before 2005, no specific compatibility criteria were in force at the time to assess the compatibility of investment aid to airports. The Commission has therefore to assess these measures directly on the basis of Article 107(3)(c) TFEU, taking into account its decision-making practice in this matter. The Commission's practice regarding the assessment of the compatibility of aid granted to airport managers was consolidated in the 2005 Aviation Guidelines. Therefore the Commission will assess the compatibility of investment aid granted to Flugplatz Altenburg-Nobitz GmbH before 2005 on the basis of the criteria set out in the 2005 Aviation Guidelines.

(279) The 2005 Aviation Guidelines provide a framework for assessing whether investment aid to airports may be declared compatible pursuant to Article 107(3)(c) TFEU. According to point 61 of the 2005 Aviation Guidelines the Commission has to examine whether:

(a) the construction and operation of the infrastructure meets a clearly defined objective of general interest (regional development, accessibility, etc.);

(b) the infrastructure is necessary and proportional to the objective which has been set;

(c) the medium-term prospects for use of the infrastructure are satisfactory, in particular as regards the use of existing infrastructure;

(d) all potential users of the infrastructure have access to it in an equal and non-discriminatory manner;

(e) the development of trade is not affected to an extent that is contrary to the EU interest.

(280) In addition to the requirement to satisfy specific compatibility criteria specified in the 2005 Aviation Guidelines, State aid to airports, like all other State aid measures, should have an incentive effect. It should also be necessary and proportionate to the desired legitimate objective in order to be cleared as compatible aid ([132]).

8.2.1.1. *The construction and operation of the infrastructure meets a clearly defined objective of common interest (regional development, accessibility, etc.)*

(281) According to Germany and to the articles of incorporation of the airport's operator, the objective of the latter is to improve the economic-related infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.

(282) By financing the main infrastructure developments of the airport during the period in question, the *Land* of Thuringia aimed to improve the accessibility of the region and thus stimulate regional development and the creation of new jobs in a structurally weak region, as good passenger and freight transport connections are essential for the competitiveness of local business and industry.

([132]) It is settled case-law that the Commission can declare an aid measure compatible only if it is necessary for achieving a legitimate objective (see, for example, Case 730/79 Philip Morris; Case C-390/06 Nuova Agricast; Case T-162/06 Kronoply).

(283) Indeed, in 2007 Germany based its assessment regarding infrastructure financing on the Klophaus study, which stated in particular that the direct, indirect, induced and catalyst effects of AOC for the economy and attractiveness of the region, especially concerning jobs, are positive and significant. A growing number of passengers would let AOC become a regional airport offering the chance to the Altenburger Land of changing its international profile and therefore improving its economic and business structures. According to this study, AOC would have brought significant overall economic benefits of common interest for the whole region of central Germany.

(284) In this respect, as indicated in Table 1, the number of passengers at the airport significantly increased until the years 2007-2010: the airport attracted a number of incoming passengers to the region, which is of a particular importance for the area's economy. In the beginning of 2000, and until circa 2007, traffic forecasts were positive and supported the need for further infrastructure developments. In addition, the airport itself played an important role as an employer and indirectly generated the creation of induced jobs in the region ([133]).

(285) The infrastructure investments in question did not constitute a duplication of existing infrastructure. The closest airport to AOC is Leipzig–Halle airport, located around 85 km and over one hour's travelling time from AOC. Furthermore, Leipzig–Halle airport is an international airport and serves both Leipzig (Saxony) and Halle (Saxony-Anhalt). AOC, as a regional airport, serves the southern part of the *Land* of Thuringia. From a business perspective, the airport is relevant for companies situated in the nearby industrial area.

(286) The Commission can therefore conclude that the financing of airport infrastructure at AOC met a clearly defined objective of common interest.

8.2.1.2. *The infrastructure is necessary and proportionate to the objective which has been set*

(287) According to the articles of incorporation of Flugplatz Altenburg-Nobitz GmbH, the object of the company is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony. During the 2000-2011 period, the airport undertook the necessary infrastructure investments in order to meet the requirements associated with this target.

(288) At the beginning of the period in question, investments were needed to adapt the overall infrastructure to airlines' needs in connection with the conversion of the former military airfield into a civil airport.

(289) Then, as Germany states, the infrastructure investments at AOC were necessary to meet the security and safety requirements of the airport in view of the increasing number of passengers targeted through the Ryanair services agreement. Investments were needed in order to renovate and update the airport. Security and safety measures were undertaken throughout the period to adapt the airport to the anticipated increase in Ryanair passengers. All studies ([134]) carried out in 2007 to assess the economic viability of the airport predicted increasing activity at AOC during the 2007-2015 period.

(290) Reconstruction work on the terminal in 2009 was completed to comply with safety requirements and the separate handling of Schengen and non-Schengen passengers. According to Germany, alternatives to this reconstruction were considered, but, given the higher number of passengers and the high costs of these alternative options, the long-term solution of reconstructing the terminal was pursued.

(291) Since the airport operator did not have sufficient funds and as Germany maintains that the main investments concerned public remit activities, public funding was needed.

(292) The Commission therefore considers that the investments in the infrastructure were necessary to adapt to increasing passenger numbers as well as to meet the current requirements for modern airport infrastructure. The airport was only able to serve the connectivity and the development of the region with the infrastructure built.

([133]) See recital 96.
([134]) See footnote 34.

(293) The necessity and proportionality of the investment aid to Flugplatz Altenburg-Nobitz GmbH therefore follows from the need to meet current requirements for modern airport infrastructure. The Commission therefore concludes that the infrastructure investments in question were necessary and proportionate to the objective which had been set.

8.2.1.3. *The medium-term prospects for the use of the infrastructure are satisfactory, in particular as regards the use of existing infrastructure*

(294) The medium-term prospects for use of the existing infrastructure were satisfactory, at least until 2009. The board of directors of Flugplatz Altenburg-Nobitz GmbH had already envisaged an expected overall amount of approximately EUR 20 million in infrastructure investments over the whole 2000-2010 period. Annual numbers of passengers continued to grow until the peak years of 2008-2009.

(295) Following a period of significant growth, air traffic in Germany and Europe was negatively affected by the economic and financial crisis in 2009, which resulted in a 4,6 % decrease in passenger air traffic in Germany in 2009, which was thus one of the worst years for air traffic. However, the general trend of growth in air transport was not stopped, only slowed down. Starting in June 2010 the monthly growth rates in passenger air traffic in Germany increased again and were 7 % higher than the monthly growth rates of the previous year. In line with forecasts, since 2009 Germany has enjoyed strong economic growth of around 3 % per annum. Growth in the air traffic market is normally higher than general economic growth ([135]).

(296) The three studies carried out in 2007 ([136]) all predicted that the operator of the airport would improve its annual results and reach an almost balanced operating income by the year 2015, together with the strengthening of the nearby industrial area. This was confirmed by the draft business plan drawn up for the period 2007-2015. Germany based its reasoning on the profitability of low-cost-carrier traffic and on the possible scenario that AOC could reach 500 000 passengers by 2015.

(297) Therefore, according to the information provided by Germany, the infrastructure in question would have met medium-term demand in terms of airlines and passengers and offered good prospects for use.

8.2.1.4. *All potential users of the infrastructure have access to it in an equal and non-discriminatory manner*

(298) Germany confirms that, despite the fact that Ryanair was the only airline operating from AOC in the years 2003-2011, the infrastructure was potentially open to all potential users without any commercially unjustified discrimination.

8.2.1.5. *The development of trade is not affected to an extent contrary to the EU interest*

(299) According to point 39 of the 2005 Aviation Guidelines, the category of the airport is an indication of the extent to which airports are competing with one another, and therefore also the extent to which public funding granted to an airport may distort competition. The 2005 Aviation Guidelines state that public funding to small regional airports (category D) is unlikely to distort competition or affect trade to an extent contrary to the common interest. This cannot be taken, however, as an implication or statement that distortions of competition and effects on trade are ruled out.

(300) AOC always served fewer than 150 000 passengers per annum during the period in question, so it qualifies as a small regional airport (category D) according to the 2005 Aviation Guidelines.

([135]) Updated position on the demand forecast for Kassel-Calden airport (*Aktualisierte Stellungnahme zur Nachfrageprognose für den Flughafen Kassel-Calden*), Intraplan Consult GmbH, 12 March 2012, p. 8.
([136]) See footnote 34.

(301) AOC is a typical regionally oriented airport, which is reflected by the fact that a significant number of the passengers using it came from the *Land* of Thuringia. On the basis of a catchment area of around 100 km and travelling time of 60 minutes, it can be assumed that the closest airport, Leipzig-Halle airport (85 km and around 1h 10min travelling time from AOC), lies at the outer limit of the same catchment area. Leipzig–Halle airport is an international airport and serves both Leipzig (Saxony) and Halle (Saxony-Anhalt). AOC, as a regional airport, serves the southern part of the *Land* of Thuringia.

(302) Apart from their geographical distance from one another, both airports follow significantly different business models and target different types of passengers. Leipzig–Halle airport is a well-established airport and has a more sophisticated infrastructure providing greater comfort to passengers. It offers international as well as domestic flights, a number of holiday destinations and air freight transport. AOC has a rather low-comfort infrastructure and its business model was based on low-cost carriers.

(303) On the basis of the above, the Commission can therefore conclude that the investment aid granted to Flugplatz Altenburg-Nobitz GmbH neither distorts competition nor affects trade to an extent contrary to the common interest.

8.2.1.6. *The aid has an incentive effect and is necessary and proportionate*

(304) The infrastructure financing aid provided by Germany to Flugplatz Altenburg-Nobitz GmbH should have an incentive effect and should be necessary and proportionate in relation to the legitimate objective sought.

(305) The Commission must establish whether the State aid granted to Flugplatz Altenburg-Nobitz GmbH changed the behaviour of the beneficiary undertaking in such a way that it engages in activity that contributes to the achievement of a public-interest objective that: (i) it would not pursue without the aid; or (ii) it would pursue but in a limited or different manner. In addition, the aid is considered to be proportionate only if the same result could not be reached with less aid and less distortion. This means that the amount and intensity of the aid must be limited to the minimum needed for the aided activity to take place.

(306) According to the information submitted by Germany, the investments in infrastructure necessary to reach the standard of an operational airport open to commercial flights could not have been realised without the aid. The airport was loss-making over most of the period in question. Germany has always considered that such a regional airport could not operate without public funding. In particular, without the aid, the airport would not have met the expected service levels for airlines and passengers, and the level of the economic activity of the airport would have been reduced.

(307) Therefore, it can be concluded that the aid measure in question had an incentive effect, as it enabled the beneficiary to realise the necessary investments.

(308) With regard to the assessment of the proportionality of the aid, it can be considered that the intensity of the aid for the project was limited to the investments required to convert the airport from an ex-military to a civil airport, open to all potential airlines. In addition, the investment-financing process at Flugplatz Altenburg-Nobitz GmbH was organised in such a way as to avoid any overcompensation: at the end of each year, a business plan was agreed for the year to come and was then reviewed during the course of the year to adapt it to business reality ([137]). The airport had to reimburse public funders in the event of over-funding of a project. As the amount of aid was limited to the minimum necessary for the aided activity to take place, the investment aid in question can therefore be considered necessary and proportionate in relation to the legitimate objective.

8.2.1.7. *Conclusion*

(309) In view of the above assessment, the Commission concludes that the investment aid granted to Flugplatz Altenburg-Nobitz GmbH is compatible with Article 107(3)(c) TFEU, as it complies with the compatibility conditions laid down in point 61 of the 2005 Aviation Guidelines. Therefore, the measure is compatible with the internal market.

([137]) Germany provided annual business plans (*Wirtschaftsplan*) for the period 2000-2005 with the corresponding amended business plans (*Nachtrag zum Wirtschaftsplan*).

8.2.2. **Measure 2: Financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in the years 2000-2011**

(310) In accordance with the 2014 Aviation Guidelines, the Commission considers that the provisions of its notice on the determination of the applicable rules for the assessment of unlawful State aid should not apply to pending cases of unlawful operating aid to airports granted prior to 4 April 2014. Instead, the Commission will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period ([138]).

(311) The 2014 Aviation Guidelines lay down conditions under which operating aid to airports may be declared compatible with the internal market within the meaning of Article 107(3)(c) TFEU ([139]). According to point 137 of the 2014 Aviation Guidelines ([140]), in order for operating aid granted before the publication of these guidelines to be considered compatible with the internal market, the following cumulative conditions must be met:

(a) the measure must contribute to a well-defined objective of common interest;

(b) there must be a need for state intervention;

(c) the aid measure must be an appropriate policy instrument to address the objective of common interest;

(d) there must be an incentive effect;

(e) the aid must be limited to the minimum necessary; and

(f) undue negative effects on competition and trade between Member States must be avoided.

8.2.2.1. *Contribution to a well-defined objective of common interest*

(312) According to Section 5.1.2(a) of the 2014 Aviation Guidelines, in order to give airports time to adjust to new market realities and to avoid any disruptions in air traffic and connectivity of the regions, operating aid to airports will be considered to contribute to the achievement of an objective of common interest, if it: (i) increases the mobility of European Union citizens and connectivity of regions by establishing access points for intra-European Union flights; or (ii) combats air traffic congestion at major European Union hub airports; or (iii) facilitates regional development.

(313) According to the German authorities, the financing of operating losses of Flugplatz Altenburg-Nobitz GmbH was necessary to maintain continued operations at the airport, in order to meet the object of the company, as stated in its articles of incorporation, which is to improve the economically relevant infrastructure in order to strengthen the economic power of eastern Thuringia and western Saxony.

(314) Given that, in order to promote regional development in Central Germany, good points of access are required, there was a fundamental need to keep the airport functioning. The operation of the airport served regional development and job creation. Therefore, the operating aid granted was clearly aimed at facilitating regional development.

8.2.2.2. *Need for state intervention*

(315) Under Section 5.1.2(b) of the 2014 Aviation Guidelines, in order to assess whether State aid is effective in achieving an objective of common interest, it is necessary to identify the problem to be addressed. In this respect, any State aid to an airport must be geared to a situation where aid can bring about a material improvement that the market itself cannot deliver.

([138]) Point 172 of the 2014 Aviation Guidelines.
([139]) Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3), point 104.
([140]) Communication from the Commission — Guidelines on State aid to airports and airlines, point 137.

(316) Germany submits that state intervention was needed as the airport had difficulty ensuring the financing of its operations on its own. The financial reports of Flugplatz Altenburg-Nobitz GmbH often state that the financial situation of the airport was strictly linked to shareholders' and other public contributions. The existence of the company would even be jeopardised without public capital contributions ([141]).

(317) The granting of operating aid provided the airport with the necessary resources to ensure its operations and adjust its business model to the requirements of low-cost carriers.

(318) The Commission recognises that AOC is a small regional airport with fewer than 150 000 passengers per annum which, under normal market conditions, would not be able to fully cover its own operating costs. Therefore there was a need for state intervention.

8.2.2.3. *Appropriateness of the aid measure*

(319) According to Section 5.1.2(c) of the 2014 Aviation Guidelines, any aid measure for an airport must be an appropriate policy instrument to address the objective of common interest. The Member State must, therefore, demonstrate that no other less distortive policy instruments or aid instruments could enable the same objective to be reached.

(320) According to Germany, the aid measure in question is appropriate to address the intended objective of common interest that could not have been met through other less distortive policy instruments.

(321) The aid amount was geared to covering the expected funding gap of operating costs calculated for the year to come.

(322) In view of the above, the Commission considers that the measure in question was appropriate to achieve the desired objective of common interest.

8.2.2.4. *Existence of incentive effect*

(323) According to Section 5.1.2(d) of the 2014 Aviation Guidelines, an incentive effect for operating aid exists if it is likely that, in the absence of operating aid, the airport's level of economic activity would be significantly reduced. This assessment needs to take into account the presence of investment aid and the level of traffic at the airport.

(324) The financial reports of Flugplatz Altenburg-Nobitz GmbH underline that the existence of the company would be jeopardised without public capital contributions. Without operating aid to cover the airport operator's losses, the airport would eventually have become unviable due to the uncovered operating losses.

(325) In view of the above, the Commission considers that the aid measure in question had an incentive effect.

8.2.2.5. *Proportionality of the aid amount (aid limited to a minimum)*

(326) According to Section 5.1.2(e) of the 2014 Aviation Guidelines, in order to be proportionate, operating aid to airports must be limited to the minimum necessary for the aided activity to take place.

(327) In the present case, the public shareholders of the airport operator established the amount of operating aid on the basis of annual *ex ante* business plans and limited it to the funding needs of the airport.

(328) Parameters of these business plans were updated during the financial year in question with the current results of the airport. For example, on 8 November 2002, the board of directors approved the business plan for 2003 on the basis of data available in September 2002. This business plan was then updated on 24 October 2003 by the board of directors, to whom an updated business plan with data available in October 2003 was presented ([142]).

([141]) See recital 43.

([142]) Germany provided the Commission with business plans (*Wirtschaftsplan*) for the years 2000-2005 and updated business plans (*Nachtrag zum Wirtschaftsplan*) for the years 2002-2005.

(329) In view of the above, the Commission observes that the operating aid during this period allowed the airport operator to adjust its business model to its new operating requirements linked to the Ryanair services agreement, with a permanent control on the amount of financing necessary to cover the losses. The aid amount was thus limited to the expected operating losses.

(330) In addition, Germany states that the conversion of the airport in various projects ([143]) since 2010-2012 helped reduce the global funding gap of the airport and therefore shareholders' contributions. The operating aid was monitored over the whole period in question to adapt it to the real necessities of the airport.

(331) Therefore, the Commission considers that the operating aid in the case in question was proportional and limited to the minimum necessary for the aided activity to take place.

8.2.2.6. *Avoidance of undue negative effects on competition and trade between Member States*

(332) According to Section 5.1.2(f) of the 2014 Aviation Guidelines, when assessing the compatibility of operating aid, account will be taken of distortions of competition and the effects on trade. An indication of potential competition distortions or effects on trade may be the fact that the airport is located in the same catchment area as another airport with spare capacity.

(333) In the present case, the Commission observes that the closest airport is Leipzig-Halle airport, which is located 85 km and 1h 10 min by car from AOC. As stated in recitals 300 and 301, the business model of Flugplatz Altenburg-Nobitz GmbH set out from the outset to position the airport as a regional airport aimed at developing the nearby industrial area. Even if the 2007 Klophaus prognosis had been realised, the airport would have reached 500 000 passengers by 2015, which would still not have placed it in a position to compete with an airport with over two million passengers like Leipzig-Halle airport.

(334) In order to further limit the negative effects on competition and trade, Germany points out that AOC's infrastructure was open to all potential users and was not dedicated to one specific user.

(335) In view of the above, the Commission considers that the undue negative effects on competition and trade between Member States are limited to the minimum.

8.2.2.7. *Conclusion*

(336) In view of the above, the Commission concludes that the financing of operating losses of Flugplatz Altenburg-Nobitz GmbH in 2000-2011 is compatible with the internal market on the basis of Article 107(3)(c) TFEU, and in the light of the compatibility conditions laid down in Section 5.1.2 of the 2014 Aviation Guidelines.

8.2.3. **Measure 3: Airport charges and payments to Ryanair under the combination of the 2003 airport services agreement, the 2003 marketing agreement and the 2010 marketing agreement**

(337) Germany claims that the airport services contract and the marketing services agreements do not constitute State aid and therefore Germany does not provide any legal basis for potential compatibility with the internal market. Under these circumstances, it can be concluded that the aid is incompatible with the internal market given that the burden of proof of the compatibility of aid with the internal market, by way of derogation from Article 107(1) TFEU, is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied. Moreover, the Commission considers that the State aid in question cannot be considered compatible start-up aid under the relevant rules.

([143]) See recital 34.

8.2.3.1. *Applicable legal framework*

(338) As regards start-up aid, the 2014 Aviation Guidelines state that

'the Commission will apply the principles set out in these guidelines to all notified start-up aid measures in respect of which it is called upon to take a decision from 4 April 2014, even where the measures were notified prior to that date. In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid, the Commission will apply to unlawful start-up aid to airlines the rules in force at the time when the aid was granted. Accordingly, it will not apply the principles set out in these guidelines in the case of unlawful start-up aid to airlines granted before 4 April 2014.' ([144])

(339) The 2005 Aviation Guidelines, in turn, stipulate that

'the Commission will assess the compatibility of … start-up aid granted without its authorisation and which therefore infringes Article 88(3) of the Treaty [now Article 108(3) of the TFEU], on the basis of these guidelines if payment of the aid started after the guidelines were published in the *Official Journal of the European Union*.'

8.2.3.2. *Compatibility assessment for the contract concluded on 25 January 2010, combined with the airport services contract concluded on 3 March 2003 and the marketing agreement concluded on 7 April 2003*

(340) The contract with AMS was concluded in 2010, after the publication of the 2005 Aviation Guidelines. The aid in question was granted by the 2010 marketing agreement, the effects of which come on top of the two agreements concluded in 2003, which — considered in isolation — do not constitute State aid. Consequently, the compatibility of the aid must be examined under the 2005 Aviation Guidelines.

(341) Considering that the compatibility conditions for start-up aid enshrined in point 79 of the 2005 Aviation Guidelines are cumulative, it should be only necessary to demonstrate that one of those conditions is not met in order to establish that the aid to the airlines is not compatible. Nevertheless, the Commission will review several criteria set out in the 2005 Aviation Guidelines to assess the compatibility of the aid measure in question.

(342) Point 79(c) of the 2005 Aviation Guidelines specifies that, in order to be compatible, the aid should apply only to the opening of new routes or new schedules. The 2010 agreement covers the daily route to London, which had existed since 2003, and the route to Girona, which was opened in 2007. Only the route to Alicante was opened in 2010. Therefore this criterion is not met by the aid measure in question.

(343) Point 79(d) of the 2005 Aviation Guidelines requires the long-term viability and degressiveness of the measure in question: 'the route receiving the aid must ultimately prove profitable, i.e. it must at least cover its costs, without public funding. For this reason start-up aid must be degressive and of limited duration'. There is no indication that the routes in question could become profitable for Ryanair without the public funding under the marketing agreements. This is confirmed by the fact that Ryanair gave up the routes when public funding ended.

(344) Point 79(e) of the 2005 Aviation Guidelines adds the criterion of the compensation for additional start-up costs: 'the amount of aid must be strictly linked to the additional start-up costs incurred in launching the new route or frequency and which the air operator will not have to bear once it is up and running'. The aid does not appear to be related to specific start-up costs. Marketing payments to Ryanair continued throughout the entire period that the airport did business with the airline. Therefore this criterion is also not fulfilled.

(345) Finally, under point 79(f), the amount of aid in any one year may not exceed 50 % of eligible costs for that year. There is no evidence that actual spending on marketing would have amounted to twice the amount of the aid.

([144]) 2014 Aviation Guidelines, recital 174.

8.2.3.3. *Conclusion*

(346) In conclusion, the aid to Ryanair and AMS cannot be found to constitute compatible start-up aid, as the compatibility conditions are not met. The State aid granted to Ryanair and AMS under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010 therefore constitutes unlawful and incompatible State aid that has to be recovered.

9. **CONCLUSION**

9.1. MEASURE 1: FINANCING OF INFRASTRUCTURE INVESTMENTS IN THE YEARS 2000-2011

(347) The Commission considers that the aid provided to Flugplatz Altenburg-Nobitz GmbH in the form of financing of infrastructure investments throughout the 2000-2011 period is compatible with the internal market.

9.2. MEASURE 2: FINANCING OF OPERATING LOSSES OF FLUGPLATZ ALTENBURG-NOBITZ GMBH IN THE YEARS 2000-2011

(348) The Commission considers that the aid provided to Flugplatz Altenburg-Nobitz in the form of financing of operating losses throughout the 2000-2011 period is compatible with the internal market.

9.3. MEASURE 3: RYANAIR SERVICES AND MARKETING AGREEMENTS

(349) The Commission considers that the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 28 August 2008 does not constitute State aid to Ryanair/AMS.

(350) The Commission finds that Germany, through the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, provided unlawful aid to Ryanair and its wholly owned subsidiary AMS, in breach of Article 108(3) TFEU.

(351) By signing the agreement in 2010 with Ryanair and AMS, Flugplatz Altenburg-Nobitz GmbH could not, from an *ex ante* point of view, cover all the incremental costs linked to Ryanair's activities at the airport. An undue advantage was conferred on Ryanair/AMS in the form of an amount of aid which must be reimbursed to Germany.

Recovery of the aid provided to Ryanair/AMS

(352) In accordance with the TFEU and the settled case-law of the Court of Justice, the Commission is competent to decide that the Member State concerned must abolish or alter aid ([145]) when it has found that it is incompatible with the internal market. The Court has also consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to restore the previously existing situation ([146]). In this context, the Court has stated that that objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ([147]).

(353) Following that case-law, Article 14 of Council Regulation (EC) No 659/1999 ([148]) laid down that 'where negative decisions are taken in respect of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

(354) Therefore, the State aid mentioned above must be reimbursed to Germany, in so far as it has been paid out.

([145]) Case C-70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 13.
([146]) Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75.
([147]) Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraphs 64-65.
([148]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

(355) Regarding the amounts to be recovered, the Commission will consider the *ex ante* business plan set out in Section 8.1.3, Table 19, with the following additional considerations:

(a) The aid amount to be recovered should correspond to the negative incremental cash flow at the time when the decision was taken to sign the agreement. The negative cash flow corresponds to the amount of financing needed for the agreement to be market-compliant.

(b) The Commission considers that the time-frame to take into consideration for this business plan is the 2010 summer season. Indeed, the effective advantage conferred on the airline is limited to the effective duration of the agreement in question, as once this agreement was terminated Ryanair/AMS did not benefit from any more advantages from the airport.

(356) Results showing the indicative amount to be recovered by Germany from Ryanair/AMS are indicated in Table 20.

(357) To take into account the actual advantage conferred on the airline and its subsidiaries under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, the amounts indicated in Table 20 may still be adjusted in accordance with the supporting evidence provided by Germany. This adjustment is based on: (i) the difference between, on the one hand, actual payments as presented *ex post* that were made by the airline with regard to the airport charges, and on the other hand, the forecast cash flows (*ex ante*) on these items of income shown in Table 19; and (ii) the difference between, on the one hand, the actual marketing payments as presented *ex post* which were paid to the airline or its subsidiaries under the marketing agreement and, on the other hand, the marketing costs as specified *ex ante* corresponding to the amounts indicated in Table 19.

(358) As explained at recital 212, the Commission considers that, for the purpose of the application of State aid rules, AMS and Ryanair are considered to be a single undertaking. Therefore, Ryanair and AMS are jointly and severally liable for the entire reimbursement of the aid received under the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010.

(359) In addition, in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([149]), Germany has to add to the aid amount recovery interest, calculated from the date on which the unlawful aid was available to the beneficiary up to the date of its recovery ([150]). Since in the case in question the cash flows corresponding to the aid amounts are complex and were paid (at different dates) throughout the application of the combination of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010, the Commission deems it acceptable to assume for the calculation of the recovery interests that the time of payment of the aid is the end of the 2010 IATA summer season (i.e. 30 October 2010),

Table 20

Amount to be recovered for both the airport services and marketing agreements of 2003 and the 2010 marketing agreement

	2010 Summer season
Number of departing passengers	55 188
EXPECTED REVENUES *(in EUR)*	
Net charge to be paid by Ryanair per departing passenger	[…]*
Total aviation revenues	[…]*

([149]) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).
([150]) See Article 14(2) of Regulation (EC) No 659/1999.

	2010 Summer season
Non-aeronautical revenues per passenger	[…]*
Total non-aeronautical revenues	[…]*
Total revenues	[…]*
EXPECTED CHARGES *(in EUR)*	
Fixed marketing charges	[…]*
Monthly operational charges	13 943
Total operational charges	97 601
Total charges	[…]*
NET RESULT *(in EUR)* **AMOUNT TO BE RECOVERED**	**– 318 569**

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Flugplatz Altenburg-Nobitz GmbH between 2000 and 2011 by means of financing infrastructure investments in the years 2000-2011 is compatible with the internal market.

2. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Flugplatz Altenburg-Nobitz GmbH between 2000 and 2011 by means of financing operating losses in the years 2000-2011 is compatible with the internal market.

3. The airport services agreement concluded on 3 March 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, combined with the marketing services agreement concluded on 7 April 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing services agreement concluded on 28 August 2008 between Flugplatz Altenburg-Nobitz GmbH and AMS, does not constitute aid.

4. The State aid unlawfully provided by Germany in breach of Article 108(3) of the Treaty on the Functioning of the European Union to Ryanair/AMS by means of the combination of the airport services agreement concluded between Flugplatz Altenburg-Nobitz GmbH and Ryanair on 3 March 2003, the marketing services agreement concluded on 7 April 2003 between Flugplatz Altenburg-Nobitz GmbH and Ryanair, and the marketing services agreement concluded on 25 January 2010 between Flugplatz Altenburg-Nobitz GmbH and AMS is incompatible with the internal market.

Article 2

1. Germany shall recover the incompatible aid referred to in Article 1(4) from the beneficiaries.

2. Taking into account that Ryanair and AMS constitute a single economic unit for the purpose of the present Decision, they shall be jointly liable to repay the State aid received by either, by virtue of the combined application of the airport services agreement of 3 March 2003, the marketing agreement of 7 April 2003 and the marketing agreement of 25 January 2010.

3. The sums to be recovered shall include interest from the date on which they were available to the beneficiaries until their actual recovery.

4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

5. Germany shall cancel all outstanding payments of aid referred to in Article 1(4) with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(4) shall be immediate and effective.

2. Germany shall ensure that this Decision is implemented within four months following the date on which it is notified.

Article 4

1. Within two months following notification of this Decision, Germany shall submit the following information:

(a) the total amount (principal and interest) of aid received by the beneficiaries;

(b) the total amount (principal and interest) to be recovered from the beneficiaries in accordance with Article 2;

(c) a detailed description of the measures already taken or planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. At the Commission's request, it shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already repaid by the beneficiaries.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 October 2014.

For the Commission
Joaquín ALMUNIA
Vice-President